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“The Image We See Is Our Own”: Defending the Jury’s Territory at the Heart of the Democratic Process

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Lisa Kern Griffin*

"The Image We See Is Our Own": Defending the Jury's Territory at the Heart of the Democratic Process

We, The Jury: The Jury System and the Ideal of Democracy. By Jeffrey Abramson.** New York: Basic Books. 1994.

The Jury: Trial and Error in the American Courtroom. By Stephen J. Adler.*** New York: Times Books. 1994.

TABLE OF CONTENTS

I. Introduction: The Jury in the Spotlight	333
II. Democratic Ideals	336
A. Balancing Knowledge and Impartiality	338
B. A Representative Jury	343
C. Democratic Deliberation	348
III. Practical Challenges	352
IV. Democratic Power	361
V. Future Reforms	365
A. Peremptory Challenges	366
B. Instructions	368
C. Jury-Centric Courtrooms	371
D. Unanimity	374
VI. Conclusion	375

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I. INTRODUCTION: THE JURY IN THE SPOTLIGHT

Public disenchantment with the criminal justice system increasingly centers on the jury. Sensational stories, like the Simpson, King,¹ and Menendez² trials, undermine the legitimacy of jury verdicts and call into question the compatibility of the institution with the ideal of the rule of law. Such controversial verdicts have prompted reforms to limit the jury's power and to restructure the jury system.³ While the parade of celebrity trials attracts the spotlight,⁴ 1.2 million people participate in jury deliberations each year, and they generally reach a verdict that the presiding judge considers correct.⁵ Moreover, rather than subverting legality,⁶ the jury nurtures it by allowing for community input within the framework of the rule of law, and by linking the public to the institution of the courts.

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1. See Thomas M. Riordan, Note, *Copping an Attitude: Rule of Law Lessons from the Rodney King Incident*, 27 LOY. L.A. L. REV. 675 (1994).
 2. See Alan Abrahamson, *Lyle Menendez Case Ends in Mistrial; D.A. to Retry Brothers*, L.A. TIMES, Jan. 29, 1994, at A1.
 3. See, e.g., Laura Mansnerus, *Rewriting the Rules of the Jury System: Unpopular Verdicts Feed a Belief That the Process Doesn't Work*, N.Y. TIMES, Nov. 4, 1995, at A7 (discussing public distrust of the jury and the reforms proposed in response).
 4. STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 44-45 (1994) ("[T]he U.S. mass media's intense interest in court cases guarantees that any apparent misstep by any jury in any big case will receive immediate national attention and feed our sense of pessimism and disappointment."). *Id.* at 46. ("[T]he jury surely owes some of its Cubs-like reputation to its dismal performance in these few extraordinary cases.").
 5. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 420-30 (1966) (reporting that in only nine percent of all cases is the judge critical of the jury's performance); RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 23 (1980) (stating that "decisions by juries properly instructed . . . are better than decisions by a single judge") (quoting U.S. District Court Judge Charles Joiner); Interview with Judge William Huss, The Superior Court of Los Angeles County (January 9, 1994). It is also important to note that only five to fifteen percent of all federal criminal cases reach a jury trial, and at least eighty percent of those trials result in convictions. KALVEN & ZEISEL, *supra* (reporting that 15 percent of criminal dispositions are jury trials); JAMES P. LEVINE, *JURIES AND POLITICS* 34 (1992) (placing the number of felony cases resolved through jury trials at five percent). See also, JEFFREY ABRAMSON, WE, *THE JURY: SYSTEM AND THE IDEAL OF DEMOCRACY* 298 n.4 (1994) (reporting that the National Center for State Courts calculated in 1988 that jury trials constitute only 2.9 percent of all criminal dispositions, including both felonies and misdemeanors); *id.* at 253 (reporting that in 1990, the jury conviction rate actually surpassed the conviction rate in bench trials) (citing ADMIN. OFF. OF THE U.S. CTS., 1990 ANNUAL REPORT 204, Tbl. D7).
 6. See LEVINE, *supra* note 5, at 745 (defining an attitude of legality as the tendency "to obey the parameters set by the legal order").

The jury system operates under a complex mandate: Jurors must affirm that laws appear legitimate to the community,⁷ protect the interests of individual defendants, and strive for an accurate verdict. The jury, like the rule of law, negotiates the "tolerable accommodation of the conflicting interests of society."⁸ Where the jury sacrifices degrees of certainty, it also enhances flexibility and individualized justice; when public condemnation of an individual influences a verdict, the individual suffers, but there is a corresponding gain in community cohesion and the perceived legitimacy of the system. Many verdicts generate criticism about the balance the jury strikes between these competing interests. To those most concerned about the harm to the community, a jury that fails to convict an unpopular defendant appears unjust. Because the jury's consideration of the evidence is mediated through an adversarial process, fairness to the individual does not always produce the result the public expects. The jury represents the public's interests, but the deliberative process also tempers the anger and fear of the community and protects individual defendants from hasty judgments.

The language used by both critics and defenders of the jury system reveals tensions between democratic values and countermajoritarian fears of tyranny by the people. William Blackstone called the jury "the palladium of liberty,"⁹ Thomas Jefferson deemed it the touchstone of our peace and safety,¹⁰ and Patrick Devlin praised it as "the lamp that shows that freedom lives."¹¹ But critics of the jury emphasize its tensions with founding principles like the rule of law rather than its compatibility with democratic foundations like liberty and equality. Judge Jerome Frank considered the jury incompetent, prejudiced, and lawless.¹² He cited jurors as obstacles to legal certainty because they apply "laws they don't understand to facts they

7. See ABRAMSON, *supra* note 5, at 7 ("[T]he legitimacy of the law depends on acceptance by the people. And the jury today remains our best tool for ensuring that the law is being applied in a way that wins people's consent.").

8. LEVINE, *supra* note 5, at 83 (quoting Judge Learned Hand).

9. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 350 (Cooley ed., 1899).

10. See SEYMOUR WISHMAN, ANATOMY OF A JURY: THE SYSTEM ON TRIAL vii (1986). The jury is also uniquely American. More than 80 percent of all criminal jury trials in the world take place in the United States. KALVEN & ZEISEL, *supra* note 5, at 13.

11. SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

12. Judge Frank specifically opposed the general verdict, which he believed masked jurors' incompetence. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949). Judge Frank feared the jury's "infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour." VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 115 (1986) (quoting *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54 (2d Cir. 1948)).

can't get straight."¹³ Judge Frank responded to the champions of the jury system's democratic origins that what "was apparently a bulwark against an arbitrary tyrannical executive, is today the quintessence of governmental arbitrariness If anywhere we have a 'government of men,' in the worst sense of that phrase, it is in the operations of the jury system."¹⁴

Although some of our romantic ideals about jury service are mythical,¹⁵ many popular criticisms of the jury are also misguided. Jury verdicts give effect to beliefs held by a substantial portion of the public. When those beliefs are deemed illegitimate, efforts at change should focus not on the jury system, but on the underlying sources of the disjunction. Moreover, when the jury appears to falter, forces beyond its control often cause the failure. It is only the most visible component of a complex system, and criticisms of the jury reflect failings in other workings of the court as well. The public, however, takes a results-oriented view of the law, and "clues to the legitimacy of courts are not to be found in the structure of doctrine, or in the formal texts of jurists, but in the broad messages traveling back and forth between the public and the organs of popular culture."¹⁶ Popular culture portrays the criminal justice system as an obstacle course of legal rules that prevent police and prosecutors from doing their jobs. Because of both fictional depictions and the increasing coverage of real cases, many believe that all defendants have the opportunity to go to court and that high profile jury trials constitute typical cases.¹⁷

The jury system lies at the heart of our democratic system, but it has lost much of its moral authority in the popular legal culture.¹⁸ In this essay, I will consider two recent books on the jury that discuss why practitioners and the public both celebrate and condemn it. I will also examine how the jury functions as a policymaking body within

13. FRANK, *supra* note 12, at 132.

14. *Id.* See also KALVEN & ZEISEL, *supra* note 5, at 20 (quoting an attack on the jury in the *American Bar Association Journal* in 1924: "Too long has the effete and sterile jury system been permitted to tug at the throat of the nation's judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve.").

15. See, e.g., TWELVE ANGRY MEN (depicting a jury holdout struggling with fellow jurors toward the just rather than the obvious verdict).

16. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1605 (1989).

17. David A. Harris, *The Appearance of Justice: Court T.V., Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 788 (1993) ("Adjudication occupies only one point on the continuum of the criminal process, but the rest of the process is invisible on Court TV.").

18. See Maura Dolan, *Judging the Jury System: Jury System Is Held in Low Regard by Most*, L.A. TIMES, Sept. 27, 1994, at A1 (reporting that 55 percent of Los Angeles County residents have "only some or very little" confidence in the jury system, and that most of that group believes that jurors cannot set aside their prejudices and preconceived notions).

the criminal justice system, and preview reforms that might respond to criticisms about the jury's conformity to the rule of law. Despite condemnations of the system, polls show that past criminal jurors, lawyers, and judges report much higher levels of confidence in the jury than outsiders to the criminal justice system.¹⁹ Jeffrey Abramson's book, *We, the Jury: The Jury System and the Ideal of Democracy*, may explain why those who have served feel confident that the deliberative process in the jury room produces fair results. Stephen Adler's scrutiny of seemingly indefensible verdicts in *The Jury: Trial and Error in the American Courtroom* explains why those "outside" the jury system do not trust it.

II. DEMOCRATIC IDEALS

The direct and raw character of jury democracy makes it our most honest mirror, reflecting both the good and the bad that ordinary people are capable of when called upon to do justice. The reflection sometimes attracts us, and it sometimes repels us. But we are the jury, and the image we see is our own.²⁰

In *We, The Jury*, Jeffrey Abramson examines the intersection between the development of the jury system and changes in the democratic process.²¹ He locates the conflicting perceptions of the jury in the essential contradictions of democracy,²² and sees the criticisms surrounding the jury system as an indictment of democracy itself.²³ The jury wagers the most on "democracy's core claim that the people make their own best governors."²⁴ Abramson starts with the paradox that now that the jury has ceased to be an entirely elite institution and might realize its full representative promise, that democratization has provoked a "crisis of confidence in the quality and accuracy of jury verdicts."²⁵ He explores "what the jury teaches us about our-

19. *Id.* at A18 (reporting that while only 39 percent of all Los Angeles County residents say they have confidence in the jury system, 54 percent of past criminal jurors responded that they trust the system).

20. ABRAMSON, *supra* note 5, at 250.

21. He identifies the goal of his book as a "sustained study of the changing democratic ideals and values embedded in our jury practices." *Id.* at 7.

22. Abramson uses Medgar Evers as an example of how the jury system brings out both the best and the worst in our society. *Id.* at 1 n.1 (explaining that "[o]n February 5, 1994, a generation after two all-white juries had deadlocked on charges that Byron De La Beckwith had murdered the Mississippi civil rights leader in 1963, a racially mixed jury finally convicted De La Beckwith of Evers' murder.").

23. "To resent the intrusion of such popular conceptions of justice into the judicial process now strikes me as a resentment against democracy." *Id.* at 7.

24. *Id.* at 2. He compares this commitment to "the hedged bet that most of our institutions of representative democracy make on the people." *Id.*

25. *Id.* at 3.

selves and our capacity for self-governance,"²⁶ and reclaims a deliberative model of jury decisionmaking.

To resurrect a positive view of the jury, Abramson focuses on "the crucial difference between two understandings of the jury's role in a democracy."²⁷ At the core of *We, The Jury* lies the ideal of a *deliberative* jury rather than a *representative* one. Abramson defines the representative theory as a model "where jurors act as spokespersons for competing group interests."²⁸ In a deliberative model, "power flows to arguments that persuade across group lines and speak to a justice common to persons drawn from different walks of life."²⁹ Throughout the book Abramson portrays and defends the jury as a deliberative body. He praises the shift from elite to diverse juries, for example, but criticizes the emphasis on interest group politics in jury selection. Abramson argues that the distinctive "genius of the jury system has been to emphasize deliberation more than voting and representation," and he highlights each recent development that signals the ascendance of the representative model.³⁰ The representative view of the jury undermines rule of law ideals because rigid adherence to demographic balance creates the impression that cases stand or fall on the jurors rather than the merits. Neither democracy nor the jury, however, succeeds merely by "brokering justice among irreconcilably antagonistic groups."³¹

Each chapter of *We, The Jury* chronicles the decline of the deliberative ideal in jury process and urges a reconception of the jury with deliberation as its foundation. Voting is a secondary activity for the deliberative jury; a jury decision represents "more than an average of the verdict preferences of six or twelve citizens."³² Abramson characterizes the jury as "the last, best refuge" of the connection among democracy, deliberation, and the collective wisdom of ordinary people.³³ He argues for a renewed deliberative ideal of the jury, but he is not naive about its limitations: "To get the jury that resists the tyranny of

26. *Id.* at 5.

27. *Id.* at 8.

28. *Id.*

29. *Id.*

30. *Id.* at 205.

31. *Id.*

32. Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989). Ellsworth asserts that the jury's final understanding "is more complete and more accurate than any of the separate versions that contributed to it, or indeed than their average. This transcendent understanding is the putative benefit of the deliberation process." *Id.*

33. *Id.* at 11. The deliberative ideal dates back to Aristotle's suggestion that democracy's chief virtue was the "collective wisdom" of ordinary people that none could achieve alone. *Id.*

the state, we must risk our freedom on the jury that practices its own petty tyranny."³⁴

A. Balancing Knowledge and Impartiality

In the section entitled "Democratic Knowledge," Abramson traces the historical evolution of the jury from the colonial, active body to the contemporary, passive one. The shift occurred as the political climate of the country changed and more complicated conceptions of community and representation developed.³⁵ The jury now serves as the "conscience" of an increasingly complex "community." In the change from an intimate institution to a distant arbiter of impartial justice, Abramson suggests that the premium on impartiality became a mandate for ignorant jurors. Although he does not argue for a resurrection of jurors as witnesses and investigators in the trial, he chronicles the origins of the jury as a truly local institution in the colonies to "retrieve a vision of jury deliberation enriched by the ability of local jurors to know the context in which events on trial took place."³⁶ Jury trials under this model "gave local residents, in moments of crisis, the last say on what was law in their community."³⁷

The argument for local juries holds that jurors can contribute valuable knowledge about the harm done to the community without bringing prejudicial preconceptions of the defendant into deliberations. The search for a local but impartial jury highlights the inherent ten-

34. *Id.* at 5. Abramson acknowledges the major criticisms of the jury system before undertaking a historical and practical defense of the institution:

- The jury substitutes the rule of the people for the rule of law; but "justice is not always popular and the conscience of the community is not always pure."
- The gap between the complexity of cases and the qualifications of jurors continues to widen.
- The quest for demographic balance resembles interest group politics.
- The jury can be unpredictable and susceptible to emotion and prejudice.
- The jury acts as a "pseudodemocracy" that ignores the democratically elected legislature. *Id.* at 3-4.

35. See Newton N. Minow & Fred H. Cate, *Who Is An Impartial Juror in the Age of Mass Media?*, 40 AM. U. L. REV. 631, 663 (1991) ("Villages and towns have given way to cities and sprawling metropolises. Yet through the vast expansion of the media and the proliferation of communications technologies, we once again frequently know what is going on in our communities. In fact, we almost certainly know more about notorious cases than did our twelfth century predecessors.").

36. ABRAMSON, *supra* note 5, at 22. In the debate preceding the Bill of Rights, anti-Federalists pursued the idea of selecting juries from the "vicinage" where the crime occurred. Abramson explains that the anti-Federalist insistence on local juries grew out of the "colonial experience in using juries to resist the Crown." *Id.* at 23. Both John Hancock and John Peter Zenger, for example, benefited from jury defiance. *Id.* at 24-25. Eventually, the Founders reached a compromise between the Federalist preference for enlarging the geography of justice and the anti-Federalist adherence to the local jury ideal: The 1789 amendment provides for juries from the "district," which is some unit smaller than the state. *Id.* at 35.

37. *Id.* at 25.

sions between the defendant's interest in fairness and the community's interest in participation.³⁸ The Sixth Amendment³⁹ represents a compromise between the competing visions of the jury as both the property of the community and the protector of the defendant. An ideal of jury impartiality that can be achieved only by disqualifying the best-informed members of the community, however, does not inspire confidence in the accuracy of jury verdicts. The decline in public perceptions of the legitimacy of the jury represents the cost of the shift to an ideal encompassing emptiness.⁴⁰ In a recent *Wall Street Journal* editorial, Walter Olson expressed the widespread perception that the jury is selected for its incompetence. He declared that the "jury is the Queen Bee of the American legal system, reputedly all-powerful but in practice immobilized, groomed and force-fed by a swarm of functionaries."⁴¹ Olson states that jury selection today ensures that "a panel in no way reflects the views and expertise that might be found in a random cross section of the population."⁴²

Abramson agrees that the recent insistence on an impartial jury creates a false opposition between well-informed jurors and fair-minded jurors. A founding ideal of the jury system is that the judgments it renders should be informed by life experiences, but Abramson concludes that increased emphasis on the juror as a blank slate has undermined the jury's role as the conscience of the community. To Abramson, the "pejorative sound of 'local,' 'community,' or 'popular' justice is the sound of a jury system in crisis."⁴³ He suggests a more contextual analysis of impartiality in order to "insulate justice from popular prejudice and yet leave it in the hands of the populace."⁴⁴

38. Although the jury acts first as a body to resolve disputes, Abramson points out that it also serves a secondary function of educating the community about the law. Thomas Jefferson called the jury a "school by which [the] people learn the exercise of civic duties as well as rights." *Id.* at 31 (citing SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL* 88 (1990)). De Tocqueville also remarked that the jury, "by obliging men to turn their attention to other affairs than their own, . . . rubs off that private selfishness which is the rust of society." Stephen Adler, "Rigged Juries?", *ATLANTA CONST.*, Nov. 27, 1994, at D1 (quoting Alexis de Tocqueville).

39. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

40. See ABRAMSON, *supra* note 5, at 37 (distinguishing impartiality from emptiness).

41. Walter Olson, *The Jury-Selection Ordeal*, *WALL ST. J.*, Dec. 7, 1994, at A19.

42. *Id.*

43. ABRAMSON, *supra* note 5, at 55.

44. *Id.* at 18. Abramson asks "how can the jury be at one and the same time an instrument of *justice* (with all the insulation from popular pressure and local gossip that doing the 'just thing' often requires) and an instrument of *democracy* (with all the exposure to public opinion that doing the 'democratic thing' often requires)?" *Id.* (emphasis added).

Two sensational political trials from different eras of American history highlight the dilemma posed by these competing demands on the jury: the trials of Aaron Burr⁴⁵ and Oliver North.⁴⁶ In Oliver North's 1989 trial, the court excused any juror who had seen North's congressional testimony, effectively excluding jurors who were at all aware of the world around them.⁴⁷ In contrast, in Aaron Burr's trial in 1807, only jurors who expressed a decisive opinion on an element of the crime were disqualified.⁴⁸ Chief Justice Marshall's vision of the ideal jury in the Burr case differs markedly from the blank slate that courts seek today. The Chief Justice made a clear distinction between pre-trial information and a predisposition against considering the facts.⁴⁹ The Burr court's acceptance of "light" versus "fixed" impressions, however, was not a lasting doctrine. By the late nineteenth century, jury selection procedures prompted Mark Twain to object that "ignoramus alone could mete out unsullied justice."⁵⁰ Although Abramson advocates a return to Chief Justice Marshall's standard for contemporary juries, today's electronic media saturate potential jurors with information and images that surpass any "light" impression Chief Justice Marshall imagined. Contemporary trials operate under the concept of presumed bias because of media immersion;⁵¹ to seat indi-

45. Former vice president Aaron Burr was indicted for treason and other, lesser offenses on June 24, 1807. See *id.* at 38-40.

46. Oliver North was tried in 1989 on 12 charges of obstructing Congress, making false statements, destroying documents, conspiring to defraud the government, and receiving illegal gratuities. He ultimately was acquitted of nine charges and convicted on three. The court of appeals vacated the convictions because his congressional testimony might have been implicated in the verdict and remanded for a retrial that never took place. See *id.* at 49-50.

47. The exclusions stemmed from the immunity that North was granted for his testimony, but the case illustrates how jury selection in any high profile trial can lead to the dismissal of jurors with even minimal awareness of current events.

48. Chief Justice John Marshall stated that he did not want to exclude "intelligent and observing men whose minds were really in a situation to decide upon the whole case according to the testimony." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807).

49. Chief Justice Marshall determined that the impartiality of a juror was not compromised by mere knowledge or even an opinion about the case, but only by "those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them." Joseph M. Hassett, *A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and "Prejudicial" Publicity*, 43 LAW AND CONTEMP. PROBS. 155, 162 (1980) (citing *United States v. Burr*, 25 F. Cas. 49, 49 (C.C.D. Va. 1807)). See also ABRAMSON, *supra* note 5, at 44 (noting that the 12 men seated as jurors, despite the pretrial information to which they had access, acquitted Burr).

50. ABRAMSON, *supra* note 5, at 45 (quoting MARK TWAIN, *ROUGHING IT* 75 (1903)).

51. ABRAMSON, *supra* note 5, at 47. See also Hassett, *supra* note 49, at 156-157 (discussing the "undeviated rule" referred to in *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966), which holds that the jury's verdict must be based on "evidence and argument in open court.") (citing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

viduals unaware of widely publicized cases, judges and lawyers must pass over many potential jurors.

With the political and technological developments separating Oliver North from Aaron Burr, "jury selection became wed to a flawed understanding of impartiality in jurors."⁵² A national television audience had seen North testify before the Senate, and the court eliminated jury venire members who admitted they were part of that audience without any individual questioning about the level of their exposure or the possible bias that resulted.⁵³ The forewoman of the North jury declared during voir dire that she did not watch the news because she found it "depressing."⁵⁴ In response to the selection of jurors who were "congenitally somnolent in the world of government,"⁵⁵ the prosecution protested that the disqualification of all jurors who were an active part of the community resulted in unfairness to the "people's" interest in the trial.⁵⁶ The prosecution's argument recaptured the notion of the community's stake in informed resolution of the conflict and demanded adequate consideration of that factor in jury selection. According to the prosecution, the elimination of "people . . . who have read something, heard something, seen something, or talked to somebody" would "prejudice[] the case against the government at the start." Not all jurors "who are an integral part of the community, who participate in the community, who are part of what is going on in the community and who stay informed" should be disqualified.⁵⁷

52. ABRAMSON, *supra* note 5, at 48.

53. See Fred Kaplan, *North Jurors Won Seats with Blissful Ignorance*, BOSTON GLOBE, Apr. 22, 1989, at 3 (stating that jury selection was skewed toward the "disaffected and disinterested").

54. Olson, *supra* note 41, at A19.

55. See Bruce Fein, *Uninformed Jurors Put Justice at Risk*, U.S.A. TODAY, Feb. 9, 1989, at 8A (commenting that by disqualifying jurors from the Oliver North trial who had seen any part of North's widely broadcast testimony, the judge was left with jurors incompetent to serve their role: "The miniscule remainder eligible for jury service have either been understudies of Rip Van Winkle or congenitally somnolent in the world of government."). Similarly, in the Cincinnati obscenity prosecution over the Robert Mapplethorpe exhibit, the only juror who regularly attended museums was dismissed for cause because her museum attendance was an "unnecessary burden" on her objectivity. Olson, *supra* note 41, at A19.

56. Symposium, *Panel Two: Current Judicial Practice, Legal Issues, and Existing Remedies*, 40 AM. U. L. REV. 573, 581 (1991) [hereinafter *Panel Two*] (statement of Jay Stephens). See also Hassett, *supra* note 49, at 155 (criticizing the selection of jurors in the G. Gordon Liddy trial who had never heard of the Watergate break-in).

57. *Panel Two*, *supra* note 56, at 581. Attorney Ronald Olson has made similar statements: "[C]ategorical elimination of people [who might have information bearing on a case] is every bit as prejudicial as the elimination based on race." *Id.* at 578.

The Court's description of the injury of discriminatory jury selection in *Ballard v. United States*⁵⁸ supports the argument that both the defendant and the community have an interest in the composition of the jury: "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."⁵⁹ To reconcile these competing interests, many commentators recommend extensive voir dire of jurors who admit exposure to information about a case, but counsel against excluding them peremptorily.⁶⁰ As Chief Justice Marshall asserted in Aaron Burr's case, recognition that a juror possesses information relating to a case is only the beginning of the inquiry into her qualifications as a juror.⁶¹

Abramson argues that civic engagement not only signals an ability to process information, but also is a prerequisite for representing the community in jury deliberations. He acknowledges that the media reach people with information about trials, but he makes a strong case that jurors are capable of ignoring pretrial publicity in their deliberations. Surprise acquittals, like those of John DeLorean, the police officers who beat Rodney King, and Mayor Marion Barry, attest to the ability of jurors, for better or worse, to think independently.⁶² In each of these cases, the public had wide access to video images of the defendants engaged in the crime.⁶³ Judges also report that jurors routinely state that they are skeptical of what they read in the press or hear on television.⁶⁴

58. 329 U.S. 187 (1946).

59. *Id.* at 195.

60. See *Panel Two*, *supra* note 56, at 583 (statement of Jay Stephens) ("[A]sk what they have seen, what they have read, what their source of information was."). See also James J. Gobert, *Criminal Law, In Search of the Impartial Jury*, 79 J. CRIM. L. 269, 311 (1988) (arguing that the court should focus on the "animus" of a juror and eliminate her only if the information has compromised her ability to decide the case fairly). It is important to note that the issue of pretrial publicity is relevant in only a very small fraction of criminal cases. See *Panel Two*, *supra* note 56, at 593 (statement of Ronald Olson) ("[I]n most instances, you could not get newspaper or television coverage for a defendant if you paid for it . . . it is only available to the DeLoreans and to the Norths and to the Hazelwoods.").

61. See *supra* note 49.

62. See Minow & Cate, *supra* note 35, at 658-59 (challenging the association of "impartial" with "unaware" and explaining that people who are regularly exposed to the media may have exactly the skills of discernment necessary to evaluate the information they receive at trial).

63. See *id.* at 659 n.181 (citing CBS law correspondent Fred Graham's assertion after the DeLorean trial that jurors are more swayed by evidence than fazed by publicity in sensational trials: Jurors "were not going to let someone like me tell them what to think because I had been on television two and a half minutes on a few nights when they had sat through six weeks of a trial.").

64. See, e.g., *Panel Two*, *supra* note 56, at 575 (statement of Judge Stanley Sporkin).

Can courts conduct a contextual analysis of juror bias, and thereby make a place at the jury table for people who would bring something with them to the deliberations?⁶⁵ The Sixth Amendment guarantees a right to trial by an impartial jury, not by impartial jurors,⁶⁶ and protecting that right does not depend on jurors with no opinions but on the interaction of twelve different opinions in the deliberative process.⁶⁷ The legitimacy of the jury depends both on its perceived impartiality and on the extent to which it reflects the collective wisdom of the community. Abramson concludes this section by arguing for a change in the standards of jury selection to end the folly of selecting jurors "who somehow missed hearing what everyone else was talking about."⁶⁸ He argues for returning community values to the jury selection process, but faces the increasing difficulty of defining "community." What does Oliver North's community look like, or O.J. Simpson's? To answer that question, Abramson turns to the problem of assembling a cross-sectional jury.

B. A Representative Jury

Just as Abramson criticizes the conflation of impartiality and ignorance, he separates impartiality from demographics. In the section on "Democratic Representation," Abramson considers the kind of group representation that constitutes a fair cross section⁶⁹ and questions whether color blind deliberation is possible.⁷⁰ He defends the cross-sectional ideal to the extent that it aims at enriched deliberation across group lines, but criticizes it where it recommends mere proportional representation of group differences. According to his theory, jurors can bring diverse experiences to the jury room without adhering to a constituency view of voting on the verdict. When jurors merely stand in for interest groups, they "could just as well mail in their verdict."⁷¹

65. See Anna Quindlen, *We The Jury*, THE DENVER POST, June 9, 1994, at D4 (stating, after being dismissed from a jury panel for "bringing too much to the table," that there should be "coffee every day, and newer magazines, and a place at the table for people, like juror 30892, who bring too much to it").

66. U.S. CONST. amend. VI; Minow & Cate, *supra* note 35, at 659.

67. Minow & Cate, *supra* note 35, at 659 (stating that the right to an impartial jury is protected by the "rough and tumble interaction of twelve members of the community").

68. ABRAMSON, *supra* note 5, at 55.

69. See *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

70. ABRAMSON, *supra* note 5, at 10 ("How do we reconcile the ideal that justice is blind to a defendant's demographic features with realities of prejudice that make it obvious that the demographic composition of the jury matters?").

71. *Id.* at 11.

One model of the cross-sectional jury holds that jurors bear the diverse perspectives and interests of those with whom they share race, religion, gender, and ethnic background.⁷² Although no single jury member can have a purely open mind, the representative jury nonetheless achieves "diffused impartiality" by balancing the biases of its members against each other.⁷³ Abramson argues, however, that an impartial jury should not only reflect group interests but also subsume those differences in the deliberative process. Just as he criticizes the shift from impartiality to emptiness in jury selection, Abramson compares the ideal of *absorbing* biases in the deliberative process to the contemporary notion of *representing* those biases equally. The democratic, deliberative vision of the cross-sectional jury emphasizes the enhanced quality of debate when diverse insights are brought to bear on the evidence. Despite high profile failures,⁷⁴ jurors can cross demographic boundaries to reach a verdict. Although Abramson does not suggest specific standards for jury selection, he urges continued efforts to "devise a jury system that defines our common values, not just our different interests."⁷⁵ The aspiration of group-blind deliberation may outstrip the reality of some juries, but Abramson argues that it is a goal worth pursuing and a possibility within reach.

Although the representative model is at the heart of most judicial conceptions of jury composition,⁷⁶ some early cases arguing for diversity on the jury support Abramson's theory. *Ballard v. United States*,⁷⁷ for example, privileged deliberation over representation. The Court concluded that regardless of the verdict, justice is devalued when the "subtle play of influence" that results from including both sexes on a jury is lost.⁷⁸ In *Taylor v. Louisiana*,⁷⁹ on the other hand, the Court used rhetoric more focused on the representative function of

72. *See id.* at 100.

73. *Id.* at 101.

74. *See, e.g.*, David Margolick, *Tales of Racism on Simpson Jury*, N.Y. TIMES, Apr. 14, 1995, at A1, A8 ("The most-recently excused juror in the O.J. Simpson case has painted for Judge Lance Ito a picture of a panel torn by racial tensions.").

75. ABRAMSON, *supra* note 5, at 104.

76. In *Smith v. Texas*, for example, Justice Black stated:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government.

311 U.S. 128, 130 (1940).

77. 329 U.S. 187 (1946).

78. *Id.* at 193-94 ("The truth is that the two sexes are not fungible To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.").

79. 419 U.S. 522, 528 (1975).

a cross section of the community.⁸⁰ The male defendant in *Taylor* appealed his conviction for aggravated kidnapping, claiming that prejudice resulted from the underrepresentation of women in the jury pool. The Court's ruling conflates impartiality with representation: "As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent."⁸¹ The jury, according to the reasoning in *Taylor*, can best preserve public confidence when it represents the mix of popular prejudices. The principal virtue of the cross-sectional jury under this reasoning is not, therefore, the richness of deliberations, but the "political function" of legitimizing a verdict to divided segments of the community.⁸² The cross-sectional principle represents the common view that different groups have unique contributions to make to the jury, but the language in *Taylor* reveals a narrow vision of what those unique contributions are. Diversity, according to the *Taylor* Court, serves as a counterweight to the inevitable biases of other jurors. A model that focuses on adequate representation rather than informed deliberation, however, enhances the appearance but not the substance of justice.

Abramson's discussion of the cross-sectional ideal highlights not only the distinction between the jury's deliberative and representative functions, but also the tension between attention to the community's interest in representation and fairness and the defendant's interest in a favorable jury. A diverse jury best represents the mixed perspectives in most modern communities, but it conflicts with defense impulses like Clarence Darrow's golden rule of jury selection: to seek jurors "of the same sort" as the client.⁸³ A demographic cross-section of jurors might not afford the defendant a strategic advantage, but Darrow's rule overestimates the demographic variable in jury decisionmaking. Because demographics account for only fifteen percent of the variation in verdicts, many social scientists find such attempts to predict the perfect jury to be "voodoo voir dire."⁸⁴ Other factors like mistrust of the police may play a more significant role in jury decisionmaking. For example, the Federal Public Defender's Office in Washington, D.C. reports that African American jurors vote to acquit roughly the same percentage of Hispanic and white defendants as Af-

80. ABRAMSON, *supra* note 5, at 118, 122.

81. *Taylor v. Louisiana*, 419 U.S. 522, 529 n.7 (1975).

82. *Id.* (citing the "political function" of the jury).

83. Andrea Gerlin, *Jury Pickers Rely Too Much on Demographics*, WALL ST. J., Dec. 16, 1994, at B1.

84. *Id.* See also Shari Siedman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178, 181 (1990)(calling a selection process that promises an ideal jury "blatant voodoo").

rican American ones.⁸⁵ On the other hand, some verdicts clearly reflect the influence of demographics. The jury who initially acquitted four white police officers of beating Rodney King included ten white members and no African American jurors.⁸⁶

Abramson insists that the "cross-sectional ideal understood as merely a method for balancing group bias on the jury is an invitation to jurors to abandon even the attempt to approach the evidence from a disinterested point of view."⁸⁷ He envisions the jury as "the common conscience of the community and not just the register of our irreconcilable divisions."⁸⁸ Abramson finds fault, therefore, with the social science of jury selection, and he identifies the overselling of jury experts as a cause of the declining faith in the jury.⁸⁹ The popular image of scientific selection suggests that wealthy litigants can "buy" a favorable jury. Many experts conclude that scientific jury selection basically constitutes benign "intuition made manifest."⁹⁰ But traditional and highly suspect folklore about the behavior of jurors from different groups has grown into a jury selection industry that threatens the integrity of verdicts. Despite indicators that scientific selection is overrated,⁹¹ widespread criticism of it supports Abramson's theory about the community's investment in the deliberative process.

85. Jeff Rosen, *Jurymandering: A Case Against Peremptory Challenges*, THE NEW REPUBLIC, Nov. 30, 1992, at 15.

86. *Id.*

87. ABRAMSON, *supra* note 5, at 140.

88. *Id.* at 141.

89. *See id.* at 143. *See also* Maura Dolan, *Judging the Jury System: Role of Jury Consultants Controversial and Extensive*, L.A. TIMES, Sept. 26, 1994, at A1. Evidence and arguments are more important than jury composition, and jury composition will make the most difference in a case where the evidence is ambiguous.

90. *See* ABRAMSON, *supra* note 5, at 143 (quoting Stephen J. Alder, *Litigation Science: Consultants Dope Out the Mysteries of Jurors for Clients Being Sued*, WALL ST. J., Oct. 24, 1989, at A1); Dolan, *supra* note 89, at A1 ("You can't stack a jury. You can only unstack one.") (quoting Ronald Beaton, Director of Jury Consultation, Forensic Technologies, Inc.).

91. *See* ABRAMSON, *supra* note 5, at 158; HANS & VIDMAR, *supra* note 12, at 77 (reporting that some researchers have found that demographic variables only negligibly correlate with verdicts); Hans Zeisel, *Forward: The American Jury*, 43 LAW AND CONTEMP. PROBS. 414 (1980) (counseling lawyers relying on scientific jury selection to remember its spectacular failures like the mother of four conscientious objectors holding out for conviction in the Harrisburg trial of the Berrigans) (citing J. NELSON & R. OSTROW, THE FBI AND THE BERRIGANS 297 (1972)). *But see* Gobert, *supra* note 60, at 272 ("By converting what was an 'art' into a 'science,' the social scientists increase the threat that a partial jury will be impaneled. While in theory the advances in social science methodology could be used to further the objective of impaneling an impartial jury, to date the opposite has probably occurred.").

The public feels manipulated when lawyers control the participants in deliberations.⁹²

Even more troubling than the techniques of social scientists themselves is their tendency to exacerbate the inequality of resources in the courtroom. Scientific jury selection arose to ensure that unpopular political defendants received a fair trial. Academics lent their opinion polling and analysis services to anti-war protesters in a series of cases beginning in 1972.⁹³ Their success attracted entrepreneurs with the goal of overmatching rather than equaling the government's power, and large corporate defendants began to employ the techniques to select favorable juries.⁹⁴ The use of such research by wealthy clients raises ethical issues about buying favorable process. "Within the adversarial process," according to Hans and Vidmar, "it is presumed that each side will eliminate those prospective jurors most favorable to the other side and that the end result will be an impartial jury."⁹⁵ Yet when the adversaries possess unequal resources, the system is "sorely tested."⁹⁶ The use of scientific selection in the criminal contest is even more troubling because the techniques not only widen the gulf between rich and poor justice, but also undermine the community's sense that they contribute to the proceedings. The political techniques of polling and seating shadow juries heighten the perception that jury selection tracks interest group vote tallying.⁹⁷

Demographic variables both overlap and interact within the jury, and they are not determinative. Abramson believes in the "fluid group dynamics" of jury deliberation and in the possibility of an impartial jury even if it is made up of individual jurors partial in their own ways.⁹⁸ Ultimately, Abramson acknowledges that jurors' back-

92. See HANS & VIDMAR, *supra* note 12, at 93 (explaining that systematic selection aimed at a favorable rather than an impartial jury undermines the legitimacy of the trial and the resulting verdict). See also ABRAMSON, *supra* note 5 at 154 (stating that members of the community want to be "free moral agents"); ALAN M. DERSHOWITZ, *Unsung Heroes—Juries Offer True Justice*, in CONTRARY TO POPULAR OPINION 11, 12 (1992) ("[D]esigner juries threaten to skew the randomness of the jury and destroy its objectivity.").

93. See HANS & VIDMAR, *supra* note 12, at 81-82 (describing the cases).

94. See ABRAMSON, *supra* note 5, at 149. There are now ten times as many jury consultants as there were in 1982, and the 200 million dollar a year industry continues to grow. *Id.*

95. HANS & VIDMAR, *supra* note 12, at 93-94.

96. *Id.* at 94. The disparity of resources also raises questions about whether both sides should have to disclose the results of their investigations of the jury pool.

97. Stephen Adler finds scientific jury selection even more invidious than Abramson does. He compares it to product marketing that gives the jury "a psychological craving to make the desired choice." ADLER, *supra* note 90, at A10. See also Adler, *supra* note 38, at D1 (stating that the jury system loses much of its moral authority as a result of scientific selection).

98. See ABRAMSON, *supra* note 5, at 140. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 234 (1978) (stating that "the counterbalancing of various biases is critical to the

grounds and experiences influence their decisionmaking, but he does not see those factors as either strong enough or static enough to "overwhelm the force of evidence, make every member of an ethnic group fungible with every other member of the same group, override personal dynamics, and make a science out of forecasting jury behavior."⁹⁹ Scientific jury selection attracts Abramson's censure, even though he does not give it much credence, because it centrally challenges the ideal of a common justice cobbled together in deliberations. He calls it "the kind of trial practice that undermines public confidence in the jury system and teaches us to think of the other as representing someone else's justice."¹⁰⁰ It represents the basic shift in our conception of the jury from "a group that would find common ground above individual differences to a group that divides, almost predictably, along the fissures of identity in America."¹⁰¹ A purely representative model that masks division rather than seeking common ground brings diminished closure to a trial.

C. Democratic Deliberation

Abramson maintains that expanding the power of the jury would strengthen the legitimacy of jury verdicts. His most controversial proposition is to explicitly allow juries to nullify the law.¹⁰² He argues not only for better informed, more attentive, and more diverse jurors, but for the opportunity for those jurors to judge the wisdom or justice of the law they are asked to apply. Treating jurors as mechanically obedient to instructions undermines confidence in their deliberations. Abramson attributes the diminished powers of the jury after the coun-

accurate application of the common sense of the community to the facts of any given case"(emphasis added). *But see* Gobert, *supra* note 60, at 279 (arguing that "counterbalancing" will not necessarily produce an impartial jury because some biases cannot be displaced, and conflicting biases do not cancel each other out in a criminal trial that can end in a hung jury).

99. ABRAMSON, *supra* note 5, at 172.

100. *Id.* at 175. *See also* Marianne Constable, *What Books About Juries Reveal About Social Science and the Law*, 16 LAW & SOC. INQUIRY 353, 370 (1991)(stating that jurors should represent "member[s] of a community of persons who share the same law").

101. ABRAMSON, *supra* note 5, at 176.

102. *See id.* at 64 ("[F]or anyone who takes seriously the jury as a bridge between community values and the law, jury nullification is a strong plank"). Jury nullification recognizes that "jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences." Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 SO. CAL. L. REV. 168, 168 (1972). Only Indiana and Maryland currently provide for jury nullification in their state constitutions. For a thorough discussion of jury nullification in practice in Indiana and Maryland, see Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW AND CONTEMP. PROBS. 51, 79-85 (1980). *See also* Part IV, *infra* (analyzing how jury nullification relates to the role of jurors as policy makers).

try's founding period both to the problematic ideal of impartiality and to cases that by the end of the nineteenth century had ended the jury's right to decide questions of law as well as questions of fact.¹⁰³

Reviving jury nullification, according to Abramson, would fully realize a commitment to the jury as the conscience of the community.¹⁰⁴ His consistent goal is to "enlarge the space for jury deliberation," and he advocates nullification to that end.¹⁰⁵ A nullification instruction presents more problems than Abramson acknowledges, however, because enlarging the space for jury deliberation actually might prevent jurors from reaching agreement. Deliberation produces results because a group of strangers receives a set amount of information with instructions to convince each other of the wisdom of a particular decision. Nullification, while always a possibility in extreme cases because of jury secrecy, might empower the fringe viewpoint if included in the instructions. A nullification instruction could, therefore, inhibit rather than enhance deliberation. Jury nullification still occurs when a community clearly rejects a law, and juries reach uniform reluctance to convict; but minimal reluctance should not lead to these unusual

103. The anti-Federalists argued that juries should have some say over deciding the law because "[m]en no longer cultivate, what is no longer useful. . . . *Give them power and they will find understanding to use it.*" ABRAMSON, *supra* note 5, at 33 (quoting HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 5:39 (1981)). The Federalists retorted that the battle to allow juries to decide the law was first fought before the representation of local views could be accomplished democratically in the legislature. *Id.*

104. The historical acquittal of William Penn for seditious preaching before an unlawful assembly is probably the most famous example of jury nullification in the name of religious freedom. See ABRAMSON, *supra* note 5, at 70-71. See also M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. 1101, 1104-1106 (describing the Penn trial and the subsequent punishment of the jurors). In John Peter Zenger's trial, Alexander Hamilton also argued that jurors ought "to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties or estate of their fellow subjects." See ABRAMSON, *supra* note 5, at 74 (quoting JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 93 (Stanley Katz, ed. 1963)). Also note Abramson's description of the Camden draft records trial and the attorney's successful argument that the jury must determine whether defendants are "deserving of the community's scorn." ABRAMSON, *supra* note 5, at 59. Contemporary arguments for jury nullification draw together otherwise dissonant political voices that agree juries should decide whether to enforce unpopular laws. The Fully Informed Jury Association (FIJA), for example, lobbies for laws protecting the right of nullification. ABRAMSON, *supra* note 5, at 59.

105. Even as he argues for a return to jury nullification, Abramson acknowledges its ignoble history of injecting prejudice and racism into the process. ABRAMSON, *supra* note 5, at 62 ("The Southern all-white jury became a shield for local racism and a prime obstacle to enforcement of national civil rights legislation. . . . *Once we grant jurors the right to set conscience above law, we have to live with consciences we admire as well as those we despise.*") (emphasis added).

decisions. Only in extraordinary cases should jurors reach legally indefensible verdicts.

Because nullification already takes place "in extreme cases of conflict between law and conscience,"¹⁰⁶ Abramson's commitment to a formal instruction is surprising. He argues that we should recognize in theory what occurs in fact in order to have a fuller debate and openly confront the biases buried in jury deliberations.¹⁰⁷ Juries often nullify not only by refusing to follow the judge's instructions, but by reaching tenuous factual conclusions or erecting fictions around the facts of the case in order to justify their decision. Jurors "smuggl[e] their views on the justice of law into 'approved debate' about the evidence or facts."¹⁰⁸ Abramson suggests that an explicit instruction would clear the process of these fictions. License from the judge would allow the jury to identify and reject injustice directly rather than circumvent it by reaching incorrect factual conclusions that force their desired result.¹⁰⁹

The operation of jury nullification without an explicit instruction helps maintain the rule of law because it signals rifts between the community and the courts. But an explicit instruction on jury nullification might diminish legality by fostering the perception that individuals can determine the boundaries of lawful conduct. Outright jury nullification could place the victim at the mercy of the latest shifts in public opinion, whereas the underground jury nullification that now occurs protects the defendant from severe and obvious injustice but does not encourage juries to blame an unpopular or unattractive victim.¹¹⁰ Abramson counters that pressuring jurors to convict against their conscience damages the social fabric more seriously than allowing them to nullify. He fears a chasm between law and popular beliefs even though case after case illustrates that when that chasm is dangerously wide, the jury will bridge it.

Although he argues for an escape hatch for jurors who want to nullify, Abramson also states that juries should speak with one voice.

106. *Id.* at 64.

107. *Id.* at 67. *Accord* Creagan, *supra* note 104, at 1102 ("Regardless of one's personal opinion of the concept of jury nullification, reality dictates that juries, in appropriate cases, are likely to nullify the law whether they are given permission to or not. It seems practical, then, in light of the widespread support that jury nullification has recently obtained and the reality of how juries behave, to draft legislation which will enable juries to fully perform their functions while, simultaneously, keeping enough restraints on them to avoid 'anarchy.'").

108. ABRAMSON, *supra* note 5, at 67.

109. *See* KALVEN & ZEISEL, *supra* note 5, at 495 ("The jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values.").

110. While a nullification instruction permits juries to "leaven the law with lenience," Abramson recognizes that "the power to be lenient is the power to discriminate." ABRAMSON, *supra* note 5, at 92 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987)).

Unlike other democratic institutions, jury deliberations demand unanimity rather than majority rule. Political decisions do not always provide a choice that transcends the assortment of interests that people have.¹¹¹ The decision on guilt or innocence, however, requires consensus; in the ideal jury, individual views or reservations cannot be outvoted and must be assimilated or accommodated. Unanimity requires each member of the jury to persuade or be persuaded in turn. The unanimous verdict therefore protects the minority presence on the jury from tokenism.¹¹² The Court has determined, however, that nonunanimous verdicts do not necessarily alter the reliability of verdicts or the character of deliberations.¹¹³ Unanimity sets the tenor of deliberations and signals to the community that all the jurors are in agreement about the verdict. Abramson suggests that the decline in the unanimous verdict constitutes a move closer to the representative model of tallying votes and away from the ideal of consensus.

In *We, The Jury*, Abramson makes explicit the arguments "over democratic values we are already having when we argue about whether the jury's peculiar marriage of justice and democracy works for better or for worse."¹¹⁴ He asks, in the context of past and present high profile trials, whether there is "one justice for jurors to render or [] different justices for different groups?"¹¹⁵ The deliberative ideal places weighty demands on both the court and future jurors. It depends on the premise that communities can find a shared justice at the jury table. In the competing representative model, the demography of the jury provides the key to verdicts and the system aspires only to balance inherent biases. Abramson insists that disparate experiences enrich conversation but do not control it.

Although the representative ideal is ascendant, Abramson offers proposals to check that shift: abolishing peremptories, instructing on

111. See ABRAMSON, *supra* note 5, at 182 ("Disagreement and dissent are the very stuff of politics—in a democracy at least.")

112. See *id.* at 183-84 (If the jury depended on a bare majority "[i]t would be . . . the conduit through which all the factious feelings of the day would enter and contaminate justice at its source.") (quoting JOHN CALHOUN, *A DISQUISITION ON GOVERNMENT* 51 (1979)).

113. See Part V, *infra* (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972)); ABRAMSON, *supra* note 5, at 181 (discussing the impact of *Apodaca* and *Johnson*). The Court's decisions have not opened the floodgates; Louisiana and Oregon remain the only states authorizing felony convictions by less than a unanimous verdict. ABRAMSON, *supra* note 5, at 181. Los Angeles District Attorney Gil Garcetti, however, made favorable comments about nonunanimous verdicts after the hung jury in the *Menendez* case, and in the wake of the *Simpson* trial, petitions are circulating for a California ballot measure that would allow nonunanimous verdicts in most criminal cases. See Laura Mansnerus, *supra* note 3, at A7; Josh Meyer, *Non-Unanimous Jury Idea Appeals to Some Reformers*, L.A. TIMES, Sept. 28, 1994, at A12.

114. ABRAMSON, *supra* note 5, at 13.

115. *Id.* at 241.

nullification, insisting on unanimity, and reversing the trend toward disqualifying jurors for mere exposure to publicity.¹¹⁶ Unlike Stephen Adler, Abramson starts from the premise that "jurors are smarter than assumed by lawyers working from manuals."¹¹⁷ At times, the distinction between deliberative and representative seems to be a semantic one, but Abramson maintains that only a deliberative process can preserve legitimacy. In high profile cases that capture the public's attention and draw its censure, juries are labeled as primarily representative. The evidence of the jury's ability to deliberate and reach sensible and unanimous verdicts in "everyday" cases may prove Abramson's theory that the jury can join justice and democracy. Abramson does not fully explore how to put that theory into practice, but *We, The Jury* is an eloquent historical defense of the jury's place within our democratic system.

III. PRACTICAL CHALLENGES

"No matter how uplifting, energizing, and empowering the concept, what was the good of a system that produced the shoddy—and sometimes patently stupid—verdicts that frequently resulted?"¹¹⁸

Stephen Adler expresses the criticisms of the jury that Abramson avoids in his idealistic account, and he turns high profile cases into parables about the flaws of the system. *The Jury: Trial and Error in the American Courtroom* reflects Adler's background as a journalist, and it contrasts with Abramson's theoretical, contextual account of the institution. Adler reconstructs deliberations from the memories of jurors, and he interviews the players involved in selecting and persuading the jury in six different trials. Adler's book begins as though it were a continuation of Abramson's: "We celebrate the jurors' democratic power but no longer trust the decisions they reach."¹¹⁹ He offers a glimpse of a system in which "lots of sincere, serious people—for a variety of reasons—were missing key points, focusing on irrelevant issues, succumbing to barely recognized prejudices, failing to see through the cheapest appeals to sympathy or hate, and generally botching the job."¹²⁰ Despite this description, and his disagreement with the substantive outcomes of the cases he describes, Adler ultimately reveals his own attachment to the ideal of a democratic resolution to trials.

Adler separates accurate dispute resolution from the ideal of justice and finds himself "delighting in the spectacle of entrusting

116. See *id.* at 247-48. He also mentions eliminating statutory exemptions from jury service to spread the obligation and multiply the diversity.

117. *Id.* at 5.

118. ADLER, *supra* note 4, at xv.

119. *Id.* at xiii.

120. *Id.* at xiv.

whatever was at issue to a random slice of the community, rather than a single judge."¹²¹ Where Abramson praises and resurrects the democratic foundations of the jury and only hints at his doubts about its validity, Adler pushes his criticisms to the foreground and only occasionally lets his admiration show through. He begins his book by expressing his delight in the jury "minutemen aiming their muskets over stone walls," but he then criticizes the "shoddy—and sometimes patently stupid—verdicts that frequently resulted."¹²² The jury portrayed through Adler's investigative reporting inspires little confidence in the system. But even though he points out that the experiences of other countries suggest that a jury system is not a precondition of "a well-ordered society or even a representative democracy," Adler concludes that we should preserve the American jury.¹²³

Adler asks throughout his book how the democratic ideal Abramson describes can survive in the face of human error, complex trials, and procedural inefficiency. While jury verdicts are often the climax of both real dramas and fictional television and movie representations of the system, jury deliberations generally take place "off camera."¹²⁴ In *The Jury*, Adler sharpens the focus on those deliberations and reveals serious flaws. "If mystery is all that jury verdicts have going for them," he states, "the jury system is surely in deep trouble."¹²⁵ Each chapter of *The Jury* serves as another parable about the pitfalls of the jury system, and Adler insists that the problems are pervasive. In each parable, however, one can read between the lines to find juries acting exactly as they should.

The structure of the book reflects Adler's conflicted premise. He opens with a "Vision" of a jury operating fairly and effectively, and closes with the "Hope" that the jury can and will survive, but the section entitled "Disappointment" overwhelms the framing sections. Adler describes five juries who failed in ways that he claims are "more representative than anomalous."¹²⁶ *The Jury* begins where Abramson leaves off in his book, with an examination of a jury deciding whether or not to inflict the death penalty. Abramson used the imbalanced imposition of the death penalty as an example of some of the failings of the jury system, but Adler first describes a jury debating seriously and competently about it. He prizes the deliberations of this model jury because they demonstrate "the little guy speaking for all of us, justice

121. *Id.*

122. *Id.* at xiv-xv.

123. *Id.* at xv. I focus my analysis in this essay on the criminal jury system, but Adler's insights into both criminal and civil juries inform the basic question about its competence and public perceptions of its legitimacy.

124. The notable exception, of course, is *Twelve Angry Men*.

125. ADLER, *supra* note 4, at 206.

126. *Id.* at xvi.

handed up from the community, not down from some gilded hilltop legislature."¹²⁷

According to the description in the "Vision," Adler values evidence-driven deliberation, careful consideration of each element, even when the verdict looks like a foregone conclusion, and the jurors' sense of the gravity of the decision to impose death. Death penalty cases call for a community decision on whether to forgive or exact retribution. Because of the wide discretion afforded jurors, their interaction often becomes the deciding element. Adler admires the different experiences "citizen soldiers"¹²⁸ bring to the deliberations without mentioning demographic diversity. He sounds a similar note to Abramson's when he states that "our most exalted vision of the jury room is a place where members of a group, by challenging one another's ideas, values, and loyalties, can achieve a coherent result."¹²⁹ Although Adler praises this first jury, he credits straightforward facts, clear legal issues, a case of manageable length, and equally matched lawyers for their model deliberations.¹³⁰ The five cases that follow do not benefit from such a balanced courtroom, and Adler finds glaring flaws in the jury's performance.

In the first chapter of "The Disappointment" section, "Lawyer's Poker," Adler addresses the problem of jury selection through the misinformation and manipulation that led to the "not guilty" verdicts in the Marcos case. Perhaps the most remarkable story Adler tells in the book depicts a party Imelda Marcos threw for the jurors after her acquittal on racketeering, conspiracy, obstruction of justice, and mail fraud charges. The description of the party humorously but sharply mocks the jury's capacity to judge a defendant according to community values: They could not see Imelda Marcos as a peer. Adler describes the jurors emerging from the New York subway and their "steaming hot apartments in less elegant quarters of the city"¹³¹ into an evening of belly dancing, roast pig, autographed photographs of Marcos, and front row seats in her penthouse apartment to hear her sing "God Bless America," the Philippine national anthem, and "Feelings." The entire Marcos case exemplifies the burden on a jury system charged with representing a disparate citizenry in increasingly complex cases. The jurors simply did not see Marcos' actions as harmful to *their* community.

127. *Id.* at 3. Note that Adler also cites the familiar folklore of the jury's noble moments: John Peter Zenger's trial, *Twelve Angry Men*, and Alexis de Tocqueville's praise of the American jury. *Id.* at 4, 9.

128. *Id.* at 39.

129. *Id.* at 27.

130. *See id.* at 40.

131. *Id.* at 49.

But the party, as unseemly as it sounds, does not pose the problem Adler identifies in the *Marcos* case. He uses the acquittal as an illustration of the jury's susceptibility to emotional appeals, and its inability to deal with complexity or set aside personal prejudices. Adler attributes the "mutual delusion" that occurred on the jury to the lawyer's skill at steering the least capable people onto the jury and then manipulating them to his advantage.¹³² He aims his attack in this section at peremptory challenges. The weakest cases, he argues, inspire lawyers to seek easily confused jurors.¹³³ The *Marcos* jurors uniformly were "ill informed about public affairs and uninterested in the topic."¹³⁴ The defense lawyer managed to seat a juror who had never bought a newspaper and did not know before voir dire whether Imelda Marcos was a man or a woman, as well as jurors who had never heard of Marcos' co-defendant Adnan Khashoggi. The defense then painted a convincing portrait of Marcos as subservient to her husband, distanced from both his politics and his finances,¹³⁵ and as a victim of the once friendly United States government that was prosecuting the case.¹³⁶ Adler calls the tactic "history boldly rewritten to benefit jurors who were not privy to any other version."¹³⁷ Despite overwhelming evidence, the prosecution could not convince the jury to follow a trail of money leading back to Marcos.¹³⁸ The complexity of the financial transactions combined with the emotional appeal of Marcos' dramatic courtroom sobbing and fainting led many jurors to doubt the prosecution's case. They began to believe that she had been treated unfairly, and the prosecution never offered a satisfactory answer to their confusion about why she was tried in the United States.¹³⁹

But was the verdict really all that indefensible? The jurors reached a mutual decision to acquit because they saw no reason to punish Marcos and because they did not understand the United States' interest in the case.¹⁴⁰ Adler's objections to the acquittal do not necessarily indict the jury system; the prosecutors simply failed to

132. *See id.* at 50.

133. *Id.* at 53.

134. *Id.* at 59.

135. *Id.* at 65.

136. *Id.* at 67.

137. *Id.* at 65.

138. One juror commented on the complicated charts detailing financial transactions: "The lawyers were in their own little thing . . . They should have stopped and explained it to us, right?" *Id.* at 69.

139. *Id.* at 71. A juror explained: "She didn't seem like a person who would scheme and cheat people. . . . I thought, 'Why are they harassing this sick woman?'" *Id.*

140. *See id.* at 79. Another juror summed up the deliberations: "What do we want from her? She lost her husband, she lost her country, she lost her place. And for a woman like that, that's punishment. Why do we want to put the last nail in the coffin?" *Id.* at 81.

prove their case. Adler acknowledges the outgunned prosecutors, the complicated case, and the difficult instructions, but he does not locate the problem there. He insists that only the informed and articulate individuals who systematically were removed from the jury pool could have processed the information. His criticisms of excessive excuses and peremptory challenges differ from Abramson's because he focuses not on the advantage of diverse perspectives but on the disadvantage of ill-informed jurors: "The hope—that in America no one is too humble to judge, no one too exalted to be judged—had given way to the disappointment of a verdict driven by ignorance and misplaced sympathy."¹⁴¹ Yet Adler also hints at his delight in the twelve people, awed by Marcos' apartment at the post-verdict party, wielding the power to decide her fate. Ultimately, the danger of seduction by an emotional or attractive defendant¹⁴² seems a small price to pay for the legitimacy of community consensus in criminal cases.

Adler uses a murder trial to criticize the jury's ability to recall facts accurately in "Love and Death in New Jersey." Although a love-triangle scenario in which questions of credibility become crucial should present an opportunity for the jury to excel, Adler identifies "lapses, oversights, and unsupported assumptions" in the deliberations that call into question the validity of the "not guilty" verdict. The jurors reach a decision Adler attributes to the relative attractiveness of the two defendants. The deliberations he describes conjure up a popular image of the jury as "a dozen brain-deads telling each other that the defendant seems like a nice, quiet young man, then laughing at the prosecutor's tie."¹⁴³ But even though they were susceptible to appearances in reaching their verdict, the jurors did precisely what jurors are supposed to do. They assessed the witnesses' credibility and brought to the deliberations their own experiences and particularized knowledge of guns, blue collar social mores, and romance.¹⁴⁴ The result seems incorrect in part because scattered witness accounts gave the jury insufficient information to reconstruct the events. The errors here might also have occurred if a judge had made the decision.¹⁴⁵

141. *Id.* at 82.

142. Most research indicates that the jurors are not particularly good at telling when someone is lying. Jurors overwhelmingly believe that an appealing witness is more likely to be honest. See *id.* at 177-78.

143. Harris, *supra* note 17, at 785 (quoting DAVID SIMON, *HOMICIDE* 457 (1990)).

144. See ADLER, *supra* note 4, at 202-04.

145. Many of the flaws attributed to the jury would be no less prevalent in the only reasonable alternative to the system: civil law judges. Judges are not immune from the human errors that arise on the jury. A New York Criminal Court judge has even been accused of judicial misconduct for deciding the length of a defendant's sentence with a coin toss. See *Judge Facing Charges in Coin-Flipping Case*, N.Y. TIMES, Jan. 20, 1983, at B3 (The Legal Aid Society defense attorney explained "Judge Freis asked me, 'Is your client a gambling man?'").

Adler's argument takes a different turn in the civil trials in which he identifies more significant faults in the jury verdicts. In these cases, problems do arise from the jury's lack of expertise. Again, however, the glimpse Adler offers of the jury suggests both merits and flaws. He focuses on the potential for scientific jury selection to determine the outcome of a tort case in a chapter entitled "The Wizard of Odds." The chapter describes a farfetched liability case against Pizza Hut brought on behalf of a teenage boy run over by a woman who had allegedly been drinking at the restaurant. With no witnesses to place the woman either drinking in or even present at Pizza Hut that day, the case looked unwinnable. But the plaintiff's lawyers dipped into the defendant's deep pockets with the help of a scientific jury consultant.

Adler lends more credence to a jury expert's ability to determine the outcome of cases than Abramson does. He also credits selection experts with a quiet but dramatic affect on the declining faith in the jury system.¹⁴⁶ The young boy's lawyers shaped their argument with the help of jury consultants and a mock jury, and they began to instill a plausible scenario for Pizza Hut's liability in potential jurors during voir dire. If the lawyers had presented their original argument to a truly random jury, Adler claims, they could not have achieved a favorable verdict. Disappointment with shadow juries and pretrial polling reflects the community's interest in addressing disputes on a level playing field.¹⁴⁷ The affront of scientific jury selection may be that it forces the community to show its cards ahead of the game. Although both authors agree on the danger scientific selection poses to the legitimacy of the jury, Abramson differs in his insistence that jury selection does not determine the outcome of the case, and that jurors generally rise above demographics to consider the evidence.

The Pizza Hut parable reads more like a story of clever plaintiff's lawyers than an indictment of the jury system. Adler probably sneers more at the adversarial system and aggressive and creative lawyering than at the jury itself. The two sides in the case are evenly matched and the result of the case is not a particularly outlandish settlement.¹⁴⁸ Adler himself asks the question: "[W]hat's wrong with strengthening the weapons at the adversaries' disposal?"¹⁴⁹ His answer lies in the importance of the perception that the jury reaches a

146. See ADLER, *supra* note 4, at 86.

147. Adler resents the technique of selling the jury on a particular version of the case during voir dire. He critically points out Donald Vinson's advice that "jurors must not be aware that an attempt is being made to persuade them." *Id.* at 105.

148. The plaintiff eventually recovered \$450,000. *Id.* at 112. Moreover, one of the plaintiff's jury profiles even recommends people with "high social integration" because they are most likely to hold Pizza Hut to high standards in its training of employees. *Id.* at 103.

149. *Id.* at 113.

legitimate verdict. When the rights or interests of the individual appear to totally trump the community's input into resolving the case, criticism of the jury sharpens. The jury loses its moral authority when jurors serve only as pawns in a game between adversaries.¹⁵⁰ Strategic exclusions render juries less representative of their communities according to Adler's analysis.¹⁵¹

"What's a Blivet?" fully develops Adler's objections based on the jury's inability to cope with complexity. In the best of his parables, Adler begins the chapter on the impossible complexity of an antitrust case by juxtaposing a typical day in the life of the jury foreman against the life of the lawyer who ultimately wins the case. He frames the chapter with their stories to point out that the jury was out-matched from the beginning.¹⁵² But the contrast between the lawyer's elaborate preparations for the case and the jury foreman's morning of bass fishing also highlights the empowerment possible through jury service. The "big city" lawyer cannot win, whatever legal arsenal he assembles, unless a furniture manufacturer and part time fisherman finds his case credible. The lawyer prepares for five years and pioneers a novel antitrust theory under the Robinson-Patman Act, and the jury foreman responds to a summons in order to avoid his hot apartment by escaping to the Greensboro federal court for the summer.

The trial Adler describes transforms the federal courtroom into a "theatre of the absurd,"¹⁵³ and in this chapter he makes his strongest argument that the jury has outlived its usefulness. However, taken together with the jurors' confusion in the Marcos case, the deliberations here suggest not that the jury no longer serves a purpose, but that some proposed reforms to the jury system are necessary.¹⁵⁴ Adler explains the complex issue in *Liggett & Myers v. Brown & Williamson* at the beginning of the chapter in layman's terms, and the lawyers in these cases should have done the same thing for the jury. Not one

150. See *id.* ("Why should we defer to the decision of a group of individuals who have been selected for their likely partisanship and then persuaded by many of the same techniques that sell soap and breakfast cereal? When verdicts come to seem *more manipulated than majestic*, one thinks of *Brave New World* rather than *Twelve Angry Men*.")(emphasis added).

151. See *id.* at 114. Another problem he sees with scientific jury selection is the disadvantage to those who cannot afford it, and his story here would have been more alarming had it included mismatched parties. "The affluent people and the corporations can buy it, the poor radicals get it free, and everyone in between is at a disadvantage." *Id.* (citing a personal interview with sociologist Amitai Etzioni). Adler's anger at jury experts leads him to propose the elimination of peremptory challenges, "which would have a Kryptonite-like effect on these new supermen of the legal world." *Id.* at 114-15.

152. See *id.* at 116-17.

153. *Id.* at 118.

154. See *infra* Part V on "Future Reforms."

of the jurors on the case had proceeded beyond high school or regularly read a newspaper: "Many people have recurrent nightmares in which they are hunched over a final exam in a subject they've never taken or a language they've never seen. For the Greensboro jurors, the test booklets were about to be handed out."¹⁵⁵ Fiercely bored and entirely mystified, the jurors decided the case in part on their assessments of the personalities and demeanor of the attorneys and expert witnesses.¹⁵⁶

To a great extent, however, the jury divided into two camps dictated by their "ethical compasses."¹⁵⁷ The jurors debated about whether the companies competed fairly, and reached a conclusion in favor of *Liggett* that the appeals court overturned. But the position the appeals court eventually took actually had been discussed during the deliberations. The jury foreman, whom Adler described fishing at the beginning of the chapter, advocated the "correct" result, but finally gave in to the other jurors. At least one juror, therefore, instinctively understood the heart of the issue despite the complicated legal maneuvers of both sides. If the judge and the attorneys had posed the questions in clearer terms, the deliberations might have been entirely defensible.

After the trial, the jurors expressed increased curiosity, but also misgivings, about the justice system. The foreman took great pride in having served as a juror, but he concluded that "I don't believe you can leave justice to people who don't know laws and business management."¹⁵⁸ Although Adler describes the *Liggett* trial as a waste of taxpayers' and jurors' resources, the story suggests that intelligent management of the trial and comprehensible instructions could produce a legitimate verdict even in a case of this complexity. Many of the jurors displayed savvy instincts, but did not have the tools to turn them into a verdict. Adler grudgingly suggests support for the jury system even in the light of this failure when he observes that cases involving huge sums of corporate money are "political" cases in which the community should participate.¹⁵⁹

Adler offers another parable about the caprice and emotion that drive juries in his account of a case concerning liability for a transfusion of AIDS-tainted blood. The *Quintana* case, described in "Blood Money," illustrates how a jury awards damages when an individual takes on a large corporation. Adler focuses on the damages to high-

155. ADLER, *supra* note 4, at 124.

156. *See id.* at 127. The scattered quality of the deliberations here also suggests an argument for giving instructions ahead of time and for clarifying them throughout the trial. *See id.* at 130.

157. *Id.* at 133-34.

158. *Id.* at 142. Another juror asked the author: "Is the Supreme Court made up of judges or of jurors like me?" *Id.*

159. *See id.* at 144.

light that emotional appeals sometimes transcend a juror's rational decisionmaking functions. Critics of the civil jury see them as "angry avengers of the powerless rather than as sober arbiters of disputes."¹⁶⁰ Adler admits that while extraordinary damage awards often get the most press attention, the median award is actually a reasonable figure. But, he sees the "blood money" awarded to the Quintana family in this case as an example of a jury's disappointing performance. The specter of a dying AIDS patient in the courtroom haunted the jurors into overcompensating her, despite evidence that the blood bank acted prudently given what they knew at the time of the transfusion. The jury also awarded damages based in part on the size of the corporation rather than the estimated extent of the damages.¹⁶¹ In a scene that would chill any corporate defense lawyer, the jury made ad hoc calculations, multiplied their figures to account for attorneys' fees, and arrived at a sum of 8.15 million dollars. Like many of Adler's parables, the *Quintana* case falls short of the withering critique he intends. The jury made a serious and concerted effort to calculate the Quintanas' loss, and if the verdict appears extraordinary, the error stems from inadequate instructions and lack of guidance, not from any inherent flaw in the jury system. Moreover, the amount of the verdict can be seen as a reflection of the depth of the community's concern about AIDS.¹⁶²

Adler arrives at the same point as Abramson through an entirely different route. After a critical look behind the jury room door, he concludes that "[e]ven in the cases in which the juries we observed performed woefully, it seemed clear that there were powerful reasons to want a jury to make the decision."¹⁶³ Like Abramson, he bases his final defense of the jury on its democratizing function and on the accommodations that juries make between individuals and communities. Each critical parable contains an affirmation of the jury or hints that the jurors should not bear the blame for their errors. Adler finds dispiriting the trend toward "making jurors less harmful by limiting their power to do wrong rather than making them more useful and effective by giving them the tools to do right."¹⁶⁴ And he ends his book with concrete suggestions for giving them those tools. He proposes reforms to make the jury more competent, fairminded, and delibera-

160. *Id.* at 146.

161. *Id.* at 163.

162. See *id.* at 173 ("[C]ommunity values . . . had been brought to bear on the outcome."). On the other hand, medical malpractice awards are declining as the community hears the corporate outcry about their crippling effect.

163. *Id.* at 215.

164. *Id.* at 270.

tive.¹⁶⁵ Although his book focuses on "disappointment" in the jury, Adler stresses that many of the shortcomings represent the imperfections of human nature or institutional failings in the courtroom, and not fundamental flaws in the jury system.

IV. DEMOCRATIC POWER

Both Adler and Abramson end their analysis of the jury before fully exploring its role as a policymaker. The jury serves not only to protect the body politic from offenders but also to articulate the policies that frame the criminal justice system. Every trial includes a secondary drama: "the ceremonial enactment of the law itself and the affirmation of the principles, good or bad, by which society is ordered."¹⁶⁶ Abramson writes that "only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate"; jurors perform an exercise in self government even more participatory than the act of voting.¹⁶⁷

Although the jury no longer has the right to directly determine questions of law in forty-eight states,¹⁶⁸ it still plays an important role in policy development. De Tocqueville wrote in 1835 that the jury was a preeminently political institution and "one form of the sovereignty of the people."¹⁶⁹ Thomas Jefferson stated that, if called upon to decide whether to omit the people from the legislative or the judiciary, "I would say it is better to leave them out of the legislative. The execu-

165. See *id.* at 226 (explaining that jurors require the "perquisites of power," "reasonable creature comforts, practical training in the nature of their endeavor, and easier access to information about the particulars of the cases before them").

166. Friedman, *supra* note 16, at 1594 (quoting Carl Smith, *American Law and the Literary Mind*, in *LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS*, 1, 12 (1980)).

167. ABRAMSON, *supra* note 5, at 8. One tension within the policymaking role for the jury, stressed in Adler's book, is that the citizens who "vote" on the jury are selected for their indifference and inattention to the issues. One possible interpretation of the jury's indifference is that it charts a determined middle ground, even on inflammatory issues, and therefore jury policymaking reflects genuine community consensus. See also Gobert, *supra* note 60, at 288 (explaining that "voting is done in anonymity . . . [but] while the deliberations of jurors are secret to the outside world, jurors must frequently defend their positions to each other").

168. Indiana and Maryland are the exceptions. After *Sparf & Hansen v. United States*, 156 U.S. 51 (1895), the jury no longer had the legal right to decide the law in federal courts.

169. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835) ("The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated."). See also ADLER, *supra* note 4, at 5 ("The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process . . . Any erosion of citizen participation in the sanctioning system is in the long run likely . . . to result in a reduction in the moral authority that supports the process.") (quoting *Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1093 (3rd Cir. 1980) (Gibbons, J., dissenting)).

tion of the laws is more important than the making of them."¹⁷⁰ The jury actually has a hand in both activities; it can either prevent the government from acting or allow it to proceed with punishment,¹⁷¹ and it also influences the laws defining that punishment. The specter of a jury trial affects the inner workings of the justice system including settlements and plea bargains,¹⁷² and its impact extends beyond the courtroom to the legislature. Either through unwillingness to implement unjust laws or through strict application of unpopular laws, juries have taken the opportunity to change the rules themselves.

Jury nullification allows citizens to inject their beliefs about the kind of community they want to create into the judicial process.¹⁷³ It occurs when the law is so at odds with the community's opinion that even an "impartial" jury feels compelled to protest an injustice. The *Zenger* trial, establishing the press' right to print criticism of the government, may be the first example of the jury as policymakers.¹⁷⁴ Alexander Hamilton's argument in *Zenger's* defense focused on the law of the future rather than the existing law, and he urged the jurors to recognize the right of citizens to criticize their rulers.¹⁷⁵ Northern juries continued that tradition by acquitting those arrested and charged with aiding fugitive slaves.¹⁷⁶ Jury nullification also eventually

170. See ABRAMSON, *supra* note 5, at 30 (quoting Letter of Jefferson to the Abbe Arnoux, in *THE PAPERS OF THOMAS JEFFERSON* 283 (Julian P. Boyd, ed., 1958)).

171. Adler comments that as a result of John Peter Zenger's trial, "both the king's men and the colonists understood thereafter that juries could put severe limits on any ruler's use of power." ADLER, *supra* note 4, at 5.

172. See LEVINE, *supra* note 5, at 171 (stating that how a case is resolved at the pre-trial stage is governed by expectations about what would happen if the case went to a jury).

173. The Supreme Court has recognized the jury's power as the conscience of the community. In *Morissette v. United States*, 342 U.S. 246, 276 (1952), the Court stated that "juries are not bound by what seems inescapable logic to judges." See also Schefflin & Van Dyke, *supra* note 102, at 75 (discussing the Court's recognition of the importance of common sense interpretation of technical laws in *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

174. See ABRAMSON, *supra* note 5, at 75; Creagan, *supra* note 104, at 1109-10 (discussing the impact of the *Zenger* trial on the early American jury: "[I]n colonial America, the jury was a shield between the people and an undemocratic, tyrannical government. The jury provided the only significant means of democratic expression available to the people at this time."). See also Rene Lynch, *Reformers Want to Give Jurors a Freer Hand*, L.A. TIMES, Sept. 7, 1993, at B1 (Orange County ed.) (calling nullification a "blow for liberty in a time of tyranny") (quoting William C. Thompson, Associate Professor of Criminology, Law, and Society at U.C. Irvine).

175. See HANS & VIDMAR, *supra* note 12, at 34 (describing Hamilton's presentation to the jury on the kind of statement that should constitute libel and the right of citizens to criticize their rulers).

176. See ABRAMSON, *supra* note 5, at 80-82 (stating that Northern defense lawyers put the Fugitive Slave law itself on trial).

ended the Salem witch trials and effected the repeal of Prohibition.¹⁷⁷ One recent example of jury nullification is the acquittal of an African American defendant in Washington, D.C. based on the jury's convictions about racial disparities in incarceration rates and the belief that those disparities reflect racism in the administration of justice.¹⁷⁸ Particularly for underrepresented groups, jury nullification is an opportunity for oversight in a system dominated by police, prosecutorial, and judicial discretion. Nullification, when it signals a gap between community beliefs or priorities and the law, embodies the democratic potential of the jury. In "political trials," when the government serves as both prosecutor and victim, the opening for democratic participation is especially important.¹⁷⁹

Juries bring the community's views on the state of the law into the courtroom. In the civil context, several recent articles document a decline in damage awards, attributable to both the perception that they cripple business and widespread anti-regulatory sentiment.¹⁸⁰ On the criminal side, juries mirror evolving understanding of domestic violence and acquaintance rape.¹⁸¹ The *Goetz* trial also provides a dra-

177. See Schefflin & Van Dyke, *supra* note 102, at 71 (explaining that because of the high acquittal rate in prohibition cases during the 1920s and early 1930s, prohibition laws could not be enforced and the laws eventually were repealed).

178. See Randall Kennedy, *Changing Images of the State: The State, Criminal Law, and Racial Discrimination*, 107 HARV. L. REV. 1255, 1260 n.21 (1994) (reporting that some jurors have refused to vote to convict African American defendants even though they believed they were guilty beyond a reasonable doubt because they have heard claims that racial disparities in incarceration rates reflect racism in the criminal justice system). See also Barton Gellman & Shari Horwitz, *Letter Stirs Debate After Acquittal*, WASH. POST, Apr. 22, 1990 at A1 (describing a letter received by a court official from a juror asserting that the jury acquiesced to the foreman who "didn't want to send anymore young black men to jail, even if he did kill that young man over drugs"); Minow & Cate, *supra* note 35, at 661 (confirming the story) (citing Klaidman, *Racial Politics in the Jury Room*, LEGAL TIMES, Apr. 23, 1990, at 1). The instinct to rein in the government may also have influenced the surprising acquittal in the DeLorean case. One juror explained:

We weren't trying to make policy or send messages, but there is a message here. . . . It's that our citizens will not let our government go too far. . . . In this country, the government can only go so far and then its citizens will draw them back in line. And that's what we did — in this case only. . . . We were not making any kind of statement about what the government does generally. We were simply telling the government that it went too far on this one. You see we just did our job as jurors, which is one hell of a responsibility.

Hans & Vidmar, *supra* note 12, at 18.

179. Schefflin, *supra* note 102, at 191.

180. See, e.g., Richard Pérez-Peña, *Study Finds Sharp Drop Last Year in Awards for Medical Malpractice Cases*, N.Y. TIMES, Jan. 27, 1995, at B22 (attributing a sharp decline in jury awards in malpractice cases to the "national dialogue on tort reform and soaring health care costs").

181. See, e.g., LEVINE, *supra* note 5, at 111 (reporting a steady increase in rape convictions since the 1960s and attributing it, at least in part, to "increased public sup-

matic example of a jury decision reflecting public fears and frustrations about crime.¹⁸² In another variation on its policymaking role, the jury's acceptance of the insanity defense for John Hinckley directly led to a reformulation of the defense.

The argument in the North trial that the government, as the people's representative, benefits from engaged jurors further supports the idea that the jury system serves an underlying policymaking function. The prosecution asserted that "we want [jurors] informed so they will be good citizens. Good citizens make good jurors, whether it is for the government or for the defense. And to preclude good citizens from serving on the jury because they are informed really goes against all of the constitutional bases of free trial, free press, the right to a jury trial and good government."¹⁸³ The conflation of language about constitutional rights, good government, and civic duties like voting lends support to the idea that jury service provides an opportunity for participatory democracy.

Many critics, on the other hand, accuse the jury of acting as a pseudodemocracy that circumvents the laws of a democratically elected legislature and thereby undermines the rule of law.¹⁸⁴ Judge Jerome Frank wrote that the jury is "the worst possible enemy of [the] ideal of the 'supremacy of law'."¹⁸⁵ "Jury-made law," according to Judge Frank, yields "the maximum in the way of lack of uniformity."¹⁸⁶ The perceived value of the jury as a lawmaker depends in large part on the beholder's view of the institution. Those who decry a lawmaking jury as the rule of individuals rather than laws view the jury as an unwarranted intrusion into the political process. But if the rule of law only exists with the consent of the governed and with continuous input from the community, then the jury's intervention into critical issues in the justice system is essential.

The jury's policymaking role actually ensures that principles of legality endure. Perceptions of the legitimacy and accuracy of jury verdicts track the communication between legal and popular culture, communication to which legislators are increasingly attuned. Jury verdicts inform lawmakers about the "harmony, or lack thereof, between the laws and the people. This information, when fed back to the

port for women's rights in the contemporary era that carries over into the jury room").

182. See *id.* at 4 ("The case was played out against a backdrop of seemingly rampant crime . . . the nationwide conservatism spurred by high crime rates was surely a key political element in the jury's handling of the Goetz case.").

183. *Panel Two*, *supra* note 56, at 596. See also Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

184. ABRAMSON, *supra* note 5, at 4.

185. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 132 (1949).

186. *Id.*

legal system and to the community, can serve to bring the law and its administration in line with popular sentiment."¹⁸⁷ Because the jury provides a direct mechanism for incorporating the views of the population, it keeps the justice system from stagnating,¹⁸⁸ and it serves rule of law values by giving the people a stake in the system. Even Adler reports that the jurors he interviewed were proud of having served and came away from the experience with a more favorable view of the system: "More than when they vote, or pay taxes, or attend a parade, they are realizing the democratic vision that still sustains our nation. They are governing themselves."¹⁸⁹

V. FUTURE REFORMS

Abramson and Adler disagree descriptively on the competence of the jury and normatively on the theoretical foundations that support it, but neither proposes abandoning it altogether. Both argue that incremental reform can correct many of its internal flaws, salvage its reputation, and respond to the external pressure of public frustration. The jury currently carries the blame for failings of the system that have nothing to do with the competence of jurors. Some proposed reforms might shift that misplaced frustration away from the jury.¹⁹⁰ The most important predictor of legitimacy is the perceived fairness of the jury.¹⁹¹ Procedural reforms, from the beginning of the selection process to the end of deliberations, can improve the appearance of fairness if they empower rather than cripple the jury.¹⁹² Most commentators conclude that a carefully selected jury given accurate instructions and presented with coherent evidence will be superior to a judge because of jurors' collective comprehension and independent, earnest ap-

187. Schefflin & Van Dyke, *supra* note 102, at 69.

188. Interview with Judge William Huss, *supra* note 5 (expressing the opinion that, in the civil system, functionaries get jaded too early in their careers). See also ABRAMSON, *supra* note 5, at 5 ("[T]he jury, far from being obsolete, is more crucial than ever in a multiethnic society struggling to articulate a justice common to U.S. citizens.").

189. ADLER, *supra* note 4, at 242.

190. See *Panel Two*, *supra* note 56, at 593 ("[I]t is really unfair to blame jurors . . . when you have rules of evidence that are so antiquated that they make it almost impossible for a jury to understand what is going on.") (quoting Judge Stanley Sporkin).

191. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizen's Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333, 349 (1988) (discussing the results of a study showing that "[c]itizen evaluations of [the jury] are based on issues beyond the questions of competence . . . In particular, citizens are concerned with issues of fair procedure").

192. See Judge B. Michael Dann, "Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries, 68 IND. L.J. 1229, 1230 (1993) (arguing that dysfunctions stem from the system's insistence on passive jurors).

proach to the proceedings.¹⁹³ Procedural obstacles, however, often prevent careful selection, coherence, and clarity in the courtroom. Both Adler and Abramson suggest reforms to ensure these preconditions for fairness.

A. Peremptory Challenges

The debate about the survival of the peremptory challenge once again implicates the difference between advantages to the individual defendant and responsibility to the community. Both Adler and Abramson argue that abolishing the peremptory challenge would enhance the legitimacy of jury verdicts. For Abramson, peremptories are the most difficult thing to reconcile with the cross-sectional, deliberative ideal. He identifies a tension between a theory of impartiality that supports defendants eliminating jurors who might be biased against them and the theory that biases should be represented on the jury to counterweigh other group prejudices.¹⁹⁴ Restrictions on peremptories evolved as our concept of democracy grew more inclusive,¹⁹⁵ and the next logical step after *Batson* is for the Court to eliminate any peremptory challenges that target specific groups.¹⁹⁶ Abramson asks why the Court should permit any peremptory challenges exercised on the basis of "generalizations about the influence of religion, national origin, or occupation on jurors?"¹⁹⁷ Abolishing peremptory challenges might ensure that juries consist of fair cross sections of the community, and it would minimize the gamesmanship that has undermined the legitimacy of recent controversial verdicts.

Adler also argues persuasively that eliminating peremptory challenges would "mean that decades of stereotypes about how people of various ethnic groups are likely to vote would become moot."¹⁹⁸ The strongest argument against peremptories is that they allow covert ra-

193. See, e.g., Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 147.

194. ABRAMSON, *supra* note 5, at 132.

195. See Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1156 (1993) (stating that *Batson* and its progeny endeavor to "reclaim the jurybox as the microcosm of representative democracy").

196. In *Gray v. Mississippi*, 481 U.S. 648 (1987), the Court concluded that peremptories are not guaranteed by the Constitution, so their use could be significantly abridged. Ideally, the defendant would then achieve an impartial jury through the use of "for cause" challenges. In many jurisdictions, however, judges conduct voir dire and do not probe deeply enough to reveal biases.

197. ABRAMSON, *supra* note 5, at 137.

198. ADLER, *supra* note 4, at 224. He also argues that in addition to eliminating peremptories, judges should constrict exemptions and enforce the requirement of jury service: "The same people who ridicule the acquittal of Imelda Marcos or the hung juries of the Menendez brothers should by rights embrace a jury system in which everyone is required to show up for jury duty periodically and in which jury evasion is taken seriously." *Id.* at 221.

cial discrimination into the process of selecting a jury.¹⁹⁹ There is no question that peremptories sometimes have depended on crude racial stereotypes. A 1973 Dallas County prosecutor's manual advised the elimination of "any member of a minority group" because prosecutors are "not looking for a fair juror, but rather a strong, biased, and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree."²⁰⁰ Although *Batson* prevents the explicit use of peremptory challenges against racial minorities, attorneys often strike jurors for attitude, posture, appearance, and even more intangible factors.²⁰¹

The defense of peremptories focuses on their place within the adversary system. Barbara Babcock points out that the Supreme Court jurisprudence on peremptories has praised them as "well-designed to ensure both that juries are impartial and that they appear so to the litigants and to society at large."²⁰² Entrusting jury selection to the judge alone through the challenge for cause would eliminate an important check within our trial system. Peremptories serve as a necessary safety valve because many judges impose strict standards for challenges for cause.²⁰³ Peremptories also limit the power of either side to stack the jury, and trial lawyers' instincts about jurors often guide them into a compromise jury that suits both sides.²⁰⁴ Many judges maintain that the peremptory may be the only method to strike a juror who seems irrational and likely to produce a hung jury.²⁰⁵ They also grant the litigant some measure of choice over the jury and therefore some level of comfort with the result of the deliberative pro-

199. See *Batson v. Kentucky*, 476 U.S. 79, 121 (1986) (Burger, C.J., dissenting) (calling peremptory challenges "a system that allows the covert expression of what we dare not say but know is true more often than not"); *id.* at 106 (Marshall, J., concurring) (arguing for the elimination of peremptory challenges because of the potential for continuing racial discrimination: "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.").

200. Rosen, *supra* note 85, at 15.

201. *Id.* (pointing out that in a recent Alabama trial, the prosecutor was permitted to strike six of the seven African Americans on the jury for racially neutral reasons like an "unkempt and gruff" appearance).

202. Babcock, *supra* note 195, at 1175.

203. See Gerald F. Uelman, *Fixing the Jury System*, CAL. CRIM. DEF. PRAC. REP., Dec. 1994, 487 ("The argument [against peremptories] would make more sense if the threshold of challenges for cause were correspondingly loosened.").

204. Interview with Judge William Huss, *supra* note 5. But see HANS & VIDMAR, *supra* note 12, at 76 ("[L]awyers' instincts are often the least trustworthy basis on which to pick jurors.") (quoting Alan Dershowitz).

205. Interview with Judge William Huss, *supra* note 5 (explaining that peremptories eliminate jurors in danger of knowing so much that they become the "Lord Chief Justice of the jury room," and that it is impossible to keep all of the bright, attentive people off juries, so that there are always competent jurors).

cess.²⁰⁶ Both Abramson and Adler develop thoughtful critiques of the use of peremptory challenges, but neither addresses the specter of a verdict by jurors who appear unfair. Perhaps the best solution is to limit peremptories to strike a more even balance between the community's interest in a purely representative jury and the defendant's right to eliminate biased jurors. Babcock suggests reforming peremptories systematically by broadening the jury pool, reducing the number of peremptories, tailoring juror questionnaires to individual cases, preceding voir dire with opening statements, and affirmatively selecting jurors rather than exercising challenges.²⁰⁷ As Babcock urges, we should "expand" and elevate jury selection procedures to "preserve the peremptory challenge while eliminating its excesses."²⁰⁸

B. Instructions

The jury's problems with understanding the law often arise from the confusing instructions they receive rather than the jury's incompetence.²⁰⁹ The principle of lay people resolving disputes makes sense only if they are given accurate information with which to make their decisions. Peter Meijes Tiersma offers an analogy that illustrates the problems with many current jury instructions:

Imagine a tax class at a law school in which the entire course consists of a verbatim reading of the Internal Revenue Code. Students are not told that they have the right to ask questions, and the formal atmosphere of the class does not encourage them to do so. When one summons the courage to pose a question, the professor responds by rereading the entire lecture word for word, so as not to draw undue emphasis to any particular section of the Code. He refuses to give students a copy of the Code or to provide any examples or illustrations that might help them understand how the Code works in prac-

206. See Babcock, *supra* note 195, at 1176 ("Although the Supreme Court disallows race as a reason for striking jurors, and should forbid female gender as an explanation also, it does not follow that litigants must relinquish all sense of choice over their shared juries.").

207. *Id.* at 1176-79.

208. *Id.* at 1180.

209. HANS & VIDMAR, *supra* note 12, at 126 (explaining that juror comprehension problems stem at least in part from the form and delivery of the instructions). See also SAUL KASSEN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 149 (1988)("[T]he problem is not jury comprehension, but the comprehensibility of judges' instructions."). See generally Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401 (citing data to support the view that jurors do not completely understand judicial instructions); Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. REV. 77 (1988)(reporting that jurors conscientiously try to follow their instructions, but that they cannot understand most of them).

tice; he also forbids the students to do outside research. Then he hands out the final examination.²¹⁰

Jury instructions reflect a tension between communicating standards in a comprehensible manner and ensuring technical completeness to withstand appellate review.²¹¹ The technical side of the scale usually outweighs comprehension because the drafters of instructions are always repeat players in the system. As a result, jurors rarely can understand them and they take on responsibility without the tools to exercise it wisely or correctly. Terms such as "liability," "inference," "immaterial," and "preponderance" are self-evident to lawyers but baffle jurors.²¹² Judge Jerome Frank characterized the phenomenon of jury instructions as a central flaw of the jury trial,²¹³ and many commentators have asserted that judges could give simpler instructions.²¹⁴ Not only should the language of instructions be simplified,

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210. Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 39-40 (1993). This article includes a useful discussion of the linguistic basis for arguing jury instructions are often incomprehensible. Victor Villaseñor also notes a juror's reactions to a judge's instructions during deliberations in a multiple murder case:

I would like to talk about this first part of what the Judge said because . . . the second part of the instruction the Judge read was not only redundant of this first part but it was in fact . . . a negative statement. And as a teacher I'll tell you, to use a negative to try to define something is like saying a horse is a horse because it's not an elephant and, I'll tell you, not only does this tend to mislead, but it's not proper. Oh, I'd like to give those men who wrote these legal books a piece of my mind.

VICTOR VILLASEÑOR, JURY, *THE PEOPLE VS. JUAN CORONA* 235 (1977).

211. A sample instruction underscores the complications:

One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured as a result of his action or inaction.

HANS & VIDMAR, *supra* note 12, at 121 (quoting California Instruction BAJI 3.11).

212. ADLER, *supra* note 4, at 231. See also *id.* at 225-26, quoting from MARY TIMOTHY, JURY WOMAN 127-28 (1974), in which the forewoman of the Angela Davis jury recalled: "Everyone else in the courtroom knew his or her job. They knew what they were doing—everyone except us. We were overwhelmed."
213. See JEROME FRANK, *LAW AND THE MODERN MIND* 195 (Anchor Books ed., 1970) (1930) ("What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language . . .").
214. See KASSIN & WRIGHTSMAN, *supra* note 209, at 152 (quoting Kenneth Galbraith: "[T]here are no important propositions that cannot be stated in plain language."); Laurence J. Severance, et al. *Criminology: Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 233 (1984) (suggesting drafting principles to improve the clarity of criminal jury instructions and finding that "simplified language and organized presentations of legal concepts can effectively help jurors, particularly when coupled with the opportunity to discuss and deliberate").

but there is no reason why they cannot be given to the jurors at an earlier point in the trial.²¹⁵ Judges could also instruct jurors daily on the evidence issues relevant to that day's testimony.²¹⁶ Furthermore, many instructions require jurors to wipe facts they cannot possibly forget from their minds. Jurors schematize information into stories that they supplement with their own experience and common sense.²¹⁷ Early, clear instructions about the salient points of the trial might help them construct the story that answers the questions posed in the trial.

Despite the fact that recent research reveals that instructions could be rewritten to increase juror comprehension, "overwhelming forces" support the status quo.²¹⁸ The bar and jurors operate in competing linguistic universes, and the urgency of the need to rewrite the instructions often escapes the lawyers and judges who are accustomed to them. Judges and lawyers reside inside the system and cannot hear the instructions as a juror would. The complexity of the law makes it difficult to rewrite the instructions, and most states have departed from the principle of allowing the judge to comment to the jurors on the evidence.²¹⁹ Furthermore, the judges and both parties contribute to the drafting of jury instructions and the form they take

215. No law prevents judges from instructing early in the trial, but instructions are often delayed to afford lawyers an opportunity to change theories midtrial and to allow judges to begin trials with minimal preparation. See ADLER, *supra* note 4, at 227-28 ("What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events?") (quoting E. Barrett Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A. J. 1066 (1960)). See also William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. 119, 130 ("[J]urors arrive at tentative opinions in the case early in the trial, regardless of whether they are preinstructed. The benefits of improved comprehension outweigh any concern over such tentative opinions."); Dann, *supra* note 192, at 1249 n.134 (outlining the arguments against early instructions, including that they make jurors take too narrow of a perspective). But see KASSIN & WRIGHTSMAN, *supra* note 209, at 132, 135-36, 145 (noting evidence that jurors arrive at tentative opinions early in the trial, whether or not they are preinstructed).

216. See Schwarzer, *supra* note 215, at 132 (encouraging judges to use their authority to comment on the evidence in complex cases so long as they do not improperly influence the jury, and citing *Quercia v. United States*, 289 U.S. 466, 469-70 (1933)). See also Hans Zeisel, *Forward to HANS & VIDMAR, supra* note 12, at 6 ("[Judges] could instruct the jury not only at the end of the trial but also at its outset, perhaps even every morning, on the issues in the evidence they will hear that day.").

217. Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. TIMES, May 12, 1992, at C1 (quoting Dr. Nancy Pennington, a psychologist at the University of Colorado: "People don't listen to all the evidence and then weigh it at the end. . . . They process it as they go along, composing a continuing story throughout the trial that makes sense of what they're hearing.").

218. See Steele & Thornburg, *supra* note 209, at 98.

219. See *id.* at 102.

often reflects this adversarial drafting.²²⁰ Steele and Thornburg recommend two basic changes in the drafting of instructions that would improve their comprehensibility: Lawyers and judges drafting the instructions should focus on a clear statement of the law rather than stating it in all of its minute detail; and lay persons should be on the committees drafting the instructions.²²¹ Without clear instructions about how to process the information they absorb during the trial, jurors cannot fulfill their obligations either to the defendant or to the community they represent. Close attention to drafting comprehensible instructions is one incremental reform that could improve both the experience of jurors and the defensibility of the verdicts they produce.

C. Jury-Centric Courtrooms

Jurors often feel external to the process they are supposed to protect because of the overwhelming technicalities of the trial and the formally delineated roles in the courtroom. A recent ABA report concludes that "many jurors were confused, misunderstood the instructions, failed to recall evidence, and suffered enormously from boredom and frustration."²²² These findings point to a fundamental problem with the structure of the courtroom. Adler approvingly cites the jury-centric courtroom of Judge Michael Dann in Arizona. Judge Dann asserts that "[j]urors must be allowed greater roles in trials if juries are to remain up to the task of resolving today's disputes and if the institution of trial by jury is to retain its vitality."²²³ In addition to giving instructions ahead of time, Judge Dann experiments with the concept of an inquisitive jury that not only takes notes but suggests and asks questions. He also puts the upcoming legal issues in context for the jurors with a preliminary instruction introducing them to court procedures.²²⁴

Judge Dann's innovations are reminiscent of the origin of the jury as both a deliberative and an investigative body. Contemporary jurors do not bring knowledge of the defendant to the trial, but they take an active role in sifting through the relevant facts. That inquisitive role is in accord with the modern understanding of how people process information.²²⁵ Assessments of the "active" jury depend on the degree of

220. See *id.* at 105.

221. *Id.* at 106-07.

222. ADLER, *supra* note 4, at 46 (quoting Daniel H. Margolis, *Jury Comprehension in Complex Cases: Report of the Special Committee on Jury Comprehension of the ABA Section of Litigation* (December 1989)).

223. Dann, *supra* note 192, at 1230.

224. See ADLER, *supra* note 4, at 229. Adler also analyzes how the ability to ask questions might have affected the jury deliberations he criticizes in his book. See *id.* at 235-38.

225. See Josh Meyer, *Small Vanguard Presses its Case for Jury Reforms*, L.A. TIMES, September 28, 1994, at A1, A12. See also Dann, *supra* note 192, at 1238 (quoting

"initiation" commentators think judicial actors should have.²²⁶ Although the jury is a democratic institution, not everyone in the courtroom has equal speaking rights, and the controls on what the players say strikes a balance essential to the adversary process. If juries can affect the pace of the trial directly, they can disrupt a system that allows lawyers to routinely hide the ball. The debate about these incremental reforms therefore cuts to the heart of questions about the adversary process.²²⁷ Advocates of juror questions assert that jurors will be able to clarify evidence, lawyers will be alerted to issues that need further development, and jury deliberations will be better informed and more confident.²²⁸ Lawyers, however, do not recognize jurors as the most important players in the courtroom; they prefer to control the content and pace of the trial. Most judicial "insiders" also fear that juries would ask irrelevant and misleading questions that would delay the trial and derail the subsequent deliberations.²²⁹ All federal and state courts except Texas courts allow jury questioning in one form or another,²³⁰ but it meets with criti-

ARTHUR D. AUSTIN, *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM* 101 (1984): Allowing jurors to ask questions would include procedures to allow lawyers to challenge the questions or alter them outside the presence of the jury. "The traditional advocacy mentality is inconsistent with comprehension."). See ADLER, *supra* note 4, at 237-38.

226. See Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221, 222 (1990) (identifying three sources of juror passivity: (1) the inertia of legal tradition, (2) a basic distrust of juries, and (3) the attorneys' and judges' fears about losing control of the process). See also Schwarzer, *supra* note 215, at 133 ("Our legal system's single-minded devotion to a somewhat mechanistic notion of 'fairness' has led us to keep from the jury important information that we fear might have an improper effect on the verdict.").
227. See, e.g., Minow & Cate, *supra* note 35, at 656 (explaining that our system encourages lawyers to conceal evidence and try to deceive, or at least manipulate, the jury).
228. See, e.g., Larry Heuer & Steven Penrod, *Increasing Juror's Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 233-34 (1988).
229. Interview with Judge William Huss, *supra* note 5 (suggesting that only the most talkative jurors will ask questions and that most of those will be irrelevant, and hesitating to "invite time-consuming nonsense"). See also Marshall, *supra* note 193, at 153 (stating that lawyers generally know the information the jury needs and the order in which to present it most effectively). Nasheri and Rudolph identify six major objections to allowing jurors to ask questions: (1) jurors will ask improper and prejudicial questions; (2) counsel will be reluctant to object to their questions; (3) active jurors will lose their objectivity; (4) jurors will place too much emphasis on the answers to their own questions; (5) jurors who are active during the trial will dominate deliberations; and (6) jury questioning procedures will disrupt the courtroom proceedings. Hedieh Nasheri & Richard J. Rudolph, *An Active Jury: Should Courts Encourage Jurors to Participate in the Questioning Process?*, 16 AM. J. TRIAL ADVOC. 109, 118 (1992).
230. Note, *Jurors May Not Pose Written Questions to Witnesses in Criminal Cases*, 24 ST. MARY'S L.J. 1421, 1425 (1993) (citing cases in federal and state courts). Fed-

cism from judges and practitioners who fear premature deliberation and see a danger of prejudicing the jury or the parties.²³¹

Although allowing jurors to ask questions would upset the balance of power in the courtroom and could distract other jurors from the important facts, juror questions could also give the attorneys and the judge some guidance about how the trial is proceeding and how much the jurors comprehend. Without answering direct questions, the players in the courtroom could be responsive to juror confusion if they were alerted to it. For example, in the *Marcos* trial that Adler describes, the attorneys could have addressed the question of why the case was being tried in the United States if the jurors had had the opportunity to ask. In the *Liggett* trial in which the jurors were confused about the baseline antitrust laws while the lawyers were speculating among themselves about whether the jury was accepting novel theories, the whole process would have benefited from an open admission that several complex issues had eluded the jurors.

Allowing jurors to take notes is less controversial, and, although some judges express concern that it inhibits jurors' focus on the demeanor of witnesses and allows notetaking jurors to control deliberations, few prohibit it.²³² A jury-centric courtroom also would correct for some of the unappealing circumstances of jury service, perhaps even compensating jurors enough to make service feasible for a wider variety of people. Judge Dann further advocates case-specific juror orientation, preliminary jury instructions, interim summaries, written copies of final instructions, discussions of the evidence among jurors during the trial, and court interaction with deliberating jurors at or near an impasse.²³³ Although jurors asking questions may pose

eral courts have allowed jurors to question witnesses since 1954. Jeffrey S. Berkowitz, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 118 n.4 (1991). The Federal Rules of Evidence also provide some guidance on whether judges can permit jurors to ask questions. The trial judge has the authority to "exercise reasonable control over the mode and order of interrogating witnesses." FED. R. EVID. 611(a).

231. See Dann, *supra* note 192, at 1244 (Trial lawyers are invested in the customs and rituals that severely limit juror participation in the trial.). See also Berkowitz, *supra* note 230, at 147 (arguing that despite the benefits of jury questions they should be abandoned because of the danger to juror neutrality).
232. Adler offers a compelling example in his account of the *Liggett* trial of the utility of notetaking. The foreman reported that he struggled to keep the witnesses' testimony in his head while he watched the judge and lawyers scribbling feverishly on their own notepads. ADLER, *supra* note 4, at 239. See also Dann, *supra* note 192, at 1251 (pointing out that everyone else in the courtroom is taking notes in order to remember what is important); Heuer & Penrod, *supra* note 228, at 232-236 (discussing the advantages and disadvantages of juror notetaking); Schwarzer, *supra* note 215, at 138-39 (stating that notetaking is now widely accepted and explaining that jurors who take notes will be forced to concentrate and focus on what they hear).
233. See generally Dann, *supra* note 192 (discussing these reforms).

significant risks, more modest reforms like summaries of the evidence, notetaking, and clear instructions only track the ways people learn and understand new data. Studies of jury behavior illustrate the boredom and frustration that often accompany jury service,²³⁴ and an effort to remedy that situation can only improve the quality of jury deliberations and the legitimacy of the verdicts that result.

D. Unanimity

The decline of the unanimous verdict, identified by Abramson as a devaluation of the deliberative ideal, could diminish the power of minority or dissenting voices on the jury. Justice Stewart's dissent in *Apodaca v. Oregon* states that nonunanimous verdicts could corrode the community's confidence in the system if verdicts track racial or other divisions on the jury.²³⁵ Social scientists assert that the majority will not live up to the ideal of rational deliberation with the minority in the absence of the unanimity requirement.²³⁶ Representation on the jury might then include the right to be heard, but not the right to influence the outcome of deliberations. The public would not accept majority verdicts as equally reliable, particularly if they are unpopular verdicts, and the shift would undermine the legitimacy of the system.

If the jury followed a legislative model, judges would never sequester jurors or try to limit their exposure to pretrial publicity; they would encourage jurors to communicate with the constituents they supposedly represent. All nine Justices recognize in the unanimity cases that jury deliberations differ from other democratic processes, but they disagree on whether unanimity is necessary to that difference.²³⁷ The debate, according to data on jury decisionmaking, will have a greater impact on the symbolism of the jury's deliberations than on the outcome. Kalven and Zeisel report that the initial majority prevails ninety percent of the time in deliberations. The ten percent of the cases in which the minority turned the majority around, however, may be the closest and most important cases. Even though

234. See *Panel Two*, *supra* note 56, at 574 (quoting a poem written by one juror during trial: "Oh, give me a break. Just a ten-minute break. . . . Oh, give me a chance to get up and dance. I long for the door. It is such a bore.").

235. *Apodaca v. Oregon*, 406 U.S. 404 (1972) ("It does not denigrate the system of trial by jury to acknowledge that it is imperfect. . . . [Unanimity is] a necessary and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.") (Stewart, J., dissenting).

236. ABRAMSON, *supra* note 5, at 199 (reporting study proving that jury deliberations are shorter when they do not require unanimity); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (stating that under a majority verdict, deliberation could be cut off before dissenters had time to argue for their doubts) (Douglas, J., dissenting).

237. ABRAMSON, *supra* note 5, at 192.

most recent studies show that the ratio of conviction to acquittal would not change as a result of nonunanimous verdicts, jurors returning majority verdicts feel less certain of their decision than their counterparts on unanimous juries,²³⁸ and that could lead to a corresponding decline in public confidence. The argument in favor of majority verdicts emphasizes efficiency,²³⁹ while the argument for unanimity focuses on certainty. Ultimately, unanimity supports the legitimacy of the verdict, particularly if majority verdicts break down along racial lines. A high profile case resolved by a majority verdict of 10-2, if two members of the jury were of the same race as the defendant, would be greeted by both the court and the public as an illegitimate decision.

VI. CONCLUSION

Both Abramson and Adler leave the reader with the feeling that the jury, like democracy, is "the worst of all systems—except for all the others."²⁴⁰ They conclude that, despite its flaws, the jury is worth preserving. Abramson stresses that the problems of the jury, as well as its strengths, arise from its democratic foundations. Like all democratic institutions, the jury can be reevaluated. It may need to adapt to the challenges of the diverse community it serves and the increasing complexity of its task. The jury represents a delicate and problematic balance that is often upset by the competing variables in high profile trials. But the jury lies at the heart of the rule of law, not outside of it, because it is a "daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy."²⁴¹

At a time when citizens grow increasingly skeptical about their justice system, the role of the jury must be rejuvenated to ensure public participation and improve perceptions of the process. As long as the jury continues to balance the interests of the individual and the community, it will remain the centerpiece of American democracy. Each controversial case and each social science development will raise new questions and suggest further reforms, but they should not erode the democratic foundations of our justice system. We will continue to witness extraordinary and challenging verdicts, but the jury will also quietly dispense justice that complies with our national ideals of the

238. *Id.* at 200.

239. The Court accepted a development favoring efficiency over legitimacy, and undermining the deliberative ideal, when it concluded that the Constitution does not require twelve jurors in state criminal trials. *Williams v. Florida*, 399 U.S. 78 (1970).

240. DERSHOWITZ, *supra* note 92 at 11-13 (quoting Winston Churchill's famous description of democracy).

241. KALVEN & ZEISEL, *supra* note 5, at 499.

rule of law. Abramson and Adler's books are a masterful first strike in the struggle that has intensified since the verdict in the *Simpson* trial. They elevate the debate about the jury to a level above tabloid journalism and political reaction. The reasoned arguments for both preservation and change that Abramson and Adler make should help to counter the rush to dismantle this most American of institutions.